Control No: E183492601 Issue Date: 05/18/2021 Page 1

# The University of Michigan Law School

## Cumulative Grade Report and Academic Record

**Name:** Maroun,Patrick G
**Student#:** 55208289

**Degree Conferred:** JD
**Date Conferred:** May 09, 2019
**Honors:** Cum Laude

University Registrar

| Subject | Course Number | Section Number | Course Title | Instructor | Load Hours | Graded Hours | Credit Towards Program | Grade |
|---|---|---|---|---|---|---|---|---|
| **Fall 2016** | **(August 29, 2016 To December 16, 2016)** | | | | | | | |
| LAW | 510 | 002 | Civil Procedure | Maureen Carroll | 4.00 | 4.00 | 4.00 | A |
| LAW | 520 | 003 | Contracts | John Pottow | 4.00 | 4.00 | 4.00 | A- |
| LAW | 580 | 004 | Torts | Scott Hershovitz | 4.00 | 4.00 | 4.00 | B+ |
| LAW | 593 | 008 | Legal Practice Skills I | Nancy Vettorello | 2.00 | | 2.00 | S |
| LAW | 598 | 008 | Legal Pract:Writing & Analysis | Nancy Vettorello | 1.00 | | 1.00 | S |
| **Term Total** | | | | **GPA: 3.666** | **15.00** | **12.00** | **15.00** | |
| **Cumulative Total** | | | | **GPA: 3.666** | | **12.00** | **15.00** | |
| **Winter 2017** | **(January 11, 2017 To May 04, 2017)** | | | | | | | |
| LAW | 530 | 002 | Criminal Law | JJ Prescott | 4.00 | 4.00 | 4.00 | B+ |
| LAW | 540 | 002 | Introduction to Constitutional Law | Richard Primus | 4.00 | 4.00 | 4.00 | A- |
| LAW | 569 | 001 | Legislation and Regulation | William Novak | 3.00 | 3.00 | 3.00 | B+ |
| LAW | 594 | 008 | Legal Practice Skills II | Nancy Vettorello | 2.00 | | 2.00 | S |
| **Term Total** | | | | **GPA: 3.445** | **13.00** | **11.00** | **13.00** | |
| **Cumulative Total** | | | | **GPA: 3.560** | | **23.00** | **28.00** | |
| **Fall 2017** | **(September 05, 2017 To December 22, 2017)** | | | | | | | |
| LAW | 616 | 001 | Bloodfeuds | William Miller | 3.00 | | 3.00 | P |
| LAW | 654 | 001 | Editing and Advocacy | Patrick Barry | 2.00 | | 2.00 | S |
| LAW | 669 | 002 | Evidence | Eve Primus | 4.00 | 4.00 | 4.00 | A- |
| LAW | 693 | 001 | Jurisdiction and Choice Of Law | Mathias Reimann | 4.00 | 4.00 | 4.00 | A- |
| **Term Total** | | | | **GPA: 3.700** | **13.00** | **8.00** | **13.00** | |
| **Cumulative Total** | | | | **GPA: 3.596** | | **31.00** | **41.00** | |

Continued next page >

# The University of Michigan Law School

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**Name:** Maroun,Patrick G
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University Registrar

| Subject | Course Number | Section Number | Course Title | Instructor | Load Hours | Graded Hours | Credit Towards Program | Grade |
|---|---|---|---|---|---|---|---|---|
| **Winter 2018** | **(January 10, 2018 To May 03, 2018)** | | | | | | | |
| LAW | 657 | 001 | Enterprise Organization | Gabriel Rauterberg | 4.00 | 4.00 | 4.00 | A |
| LAW | 694 | 001 | International Litigation | Mathias Reimann | 3.00 | 3.00 | 3.00 | B+ |
| LAW | 747 | 001 | Taxation of Individual Income | Kyle Logue | 4.00 | 4.00 | 4.00 | B+ |
| LAW | 900 | 393 | Research | Patrick Barry | 3.00 | 3.00 | 3.00 | A |
| **Term Total** | | | | **GPA: 3.650** | **14.00** | **14.00** | **14.00** | |
| **Cumulative Total** | | | | **GPA: 3.613** | | **45.00** | **55.00** | |
| **Fall 2018** | **(September 04, 2018 To December 21, 2018)** | | | | | | | |
| LAW | 641 | 001 | Crim Just: Invest&Police Prac | Eve Primus | 4.00 | 4.00 | 4.00 | A- |
| LAW | 731 | 001 | Legal Ethics and Professional Responsibility | Bob Hirshon | 2.00 | 2.00 | 2.00 | A- |
| LAW | 812 | 001 | Islamic Law | Hamid Khan | 2.00 | 2.00 | 2.00 | A- |
| LAW | 834 | 001 | Problems in Const'l Theory | Richard Primus | 2.00 | 2.00 | 2.00 | A- |
| LAW | 900 | 138 | Research | Richard Primus | 1.00 | 1.00 | 1.00 | A- |
| LAW | 912 | 001 | Unemployment Ins Clnc: Policy | Steve Gray<br>Rachael Kohl<br>Samir Hanna | 5.00 | 5.00 | 5.00 | A |
| **Term Total** | | | | **GPA: 3.793** | **16.00** | **16.00** | **16.00** | |
| **Cumulative Total** | | | | **GPA: 3.660** | | **61.00** | **71.00** | |

Continued next page >

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# The University of Michigan Law School

## Cumulative Grade Report and Academic Record

**Name:** Maroun,Patrick G
**Student#:** 55208289

**Degree Conferred:** JD
**Date Conferred:** May 09, 2019
**Honors:** Cum Laude

University Registrar

| Subject | Course Number | Section Number | Course Title | Instructor | Load Hours | Graded Hours | Credit Towards Program | Grade |
|---|---|---|---|---|---|---|---|---|
| **Winter 2019** | **(January 16, 2019 To May 09, 2019)** | | | | | | | |
| LAW | 404 | 001 | SexualOrien/GenderID & the Law | Maureen Carroll | 2.00 | 2.00 | 2.00 | B+ |
| LAW | 643 | 001 | Crim Procedure: Bail to Post Conviction Review | Barbara Mcquade | 3.00 | | 3.00 | P |
| LAW | 677 | 001 | Federal Courts | Raymond Kethledge | 3.00 | 3.00 | 3.00 | A |
| LAW | 766 | 001 | Int'l Commercial Arbitration | Katherine Simpson | 3.00 | 3.00 | 3.00 | A |
| LAW | 900 | 378 | Research | Gabriel Rauterberg | 2.00 | 2.00 | 2.00 | A |
| **Term Total** | | | | **GPA: 3.860** | **13.00** | **10.00** | **13.00** | |
| **Cumulative Total** | | | | **GPA: 3.688** | | **71.00** | **84.00** | |

End of Transcript
Total Number of Pages 3

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

A BLACK AND WHITE TRANSCRIPT IS NOT AN ORIGINAL

# University of Michigan Law School Grading System

Honor Points or Definitions

| Through Winter Term 1993 | | Beginning Summer Term 1993 | |
|---|---|---|---|
| A+ | 4.5 | A+ | 4.3 |
| A | 4.0 | A | 4.0 |
| B+ | 3.5 | A- | 3.7 |
| B | 3.0 | B+ | 3.3 |
| C+ | 2.5 | B | 3.0 |
| C | 2.0 | B- | 2.7 |
| D+ | 1.5 | C+ | 2.3 |
| D | 1.0 | C | 2.0 |
| E | 0 | C- | 1.7 |
| | | D+ | 1.3 |
| | | D | 1.0 |
| | | E | 0 |

**Other Grades:**

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

## Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

## Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

# FORDHAM UNIVERSITY
THE JESUIT UNIVERSITY OF NEW YORK


**Lincoln Center Campus**
113 West 60th Street
New York, NY 10023
718-817-1000

**Rose Hill Campus**
441 East Fordham Road
Bronx, NY 10458
718-817-1000

**Westchester Campus**
400 Westchester Avenue
West Harrison, NY 10604
718-817-1000


**Name:** Patrick G. Maroun

**Student ID:** A09682323 **DOB:** 05-JUL **SSN:** *** - ** - 4939

**Previous Institution(s):**
FORDHAM UNIVERSITY Sep 2011 - May 2015

| COURSE # | COURSE TITLE | CRED | GRD | PTS |
|---|---|---|---|---|
| Course Level: Undergraduate | | | | |
| High School: NORWOOD HIGH SCHOOL 05-JUN-2011 | | | | |
| Current Program | | | | |
| Bachelor of Arts | | | | |
| College : Fordham College/Rose Hill | | | | |
| Major : Theology Relig Studies | | | | |
| Maj/Concentration : Faith & Culture | | | | |
| Major : Political Science | | | | |
| Comments: | | | | |
| GRAD RANK 230 / 761 | | | | |
| Degree Awarded Bachelor of Arts 16-MAY-2015 | | | | |
| Primary Degree | | | | |
| College : Fordham College/Rose Hill | | | | |
| Major : Theology Relig Studies | | | | |
| Maj/Concentration : Faith & Culture | | | | |
| Major : Political Science | | | | |
| TRANSFER CREDIT ACCEPTED BY THE INSTITUTION: | | | | |
| Fall 2011 | ADVANCED PLACEMENT | | | |
| TRNF 9999 | US HISTORY | 3.000 | TR | |
| TRNF 9999 | ENGLISH LIT AND COMP | 3.000 | TR | |
| TRNF 9999 | EUROPEAN HISTORY | 3.000 | TR | |
| Ehrs: | 9.000 QPts: | 0.000 | | |
| GPA-Hrs: | 0.000 GPA: | 0.000 | | |
| SPRING 2014 | INST FOR INT'L ED OF STUDENTS | | | |
| TRNF 9999 | SUPERVISED TCHNG.FIELD EXPER. | 3.000 | TA- | |
| TRNF 9999 | GERMAN LANG.IN CNTXT:INDEP.ABR | 4.000 | TB+ | |
| TRNF 9999 | THE POL.GEOG.OF THE NEW EUROPE | 3.000 | TA | |
| TRNF 9999 | GLOBLZTN,REGNLZTN,&INT'L.LAW | 3.000 | TA- | |
| TRNF 9999 | COEXTNCE.&CNFLCT:THE HIST.OF | 3.000 | TA | |
| Ehrs: | 16.000 QPts: | 0.000 | | |
| GPA-Hrs: | 0.000 GPA: | 0.000 | | |
| INSTITUTION CREDIT: | | | | |
| Fall 2011 | | | | |
| Fordham College/Rose Hill | | | | |
| Undeclared (Political Science) | | | | |
| ENGL 1004 | TEXTS & CONTEXTS | 3.000 | B+ | 9.990 |
| GERM 1001 | INTRODUCTION TO GERMAN I | 5.000 | B | 15.000 |
| MATH 1100 | FINITE MATHEMATICS | 3.000 | C+ | 6.990 |
| MUSC 1271 | CONCERT BAND INTERNSHIP | 0.000 | P | .000 |
| PHIL 1000 | PHIL OF HUMAN NATURE | 3.000 | B+ | 9.990 |
| POSC 1100 | INTRO TO POLITICS | 3.000 | B+ | 9.990 |
| ZZRU ADVI | FRESHMAN ADVISING | 0.000 | S | .000 |
| Ehrs: | 17.000 QPts: | 51.960 | | |
| GPA-Hrs: | 17.000 GPA: | 3.056 | | |
| Spring 2012 | | | | |
| CLASS RANK IS 441 / 953 | | | | |
| Fordham College/Rose Hill | | | | |
| ********** CONTINUED ON NEXT COLUMN ********** | | | | |

| COURSE # | COURSE TITLE | CRED | GRD | PTS |
|---|---|---|---|---|
| Term Information continued: | | | | |
| Undeclared (Political Science) | | | | |
| ENGL 4999 | COMPOSITION II | 3.000 | B+ | 9.990 |
| GERM 1501 | INTERMEDIATE GERMAN I | 3.000 | B- | 8.010 |
| POSC 2610 | INTRO TO COMPARATIVE POLITICS | 4.000 | B+ | 13.320 |
| THEA 1100 | INVITATION TO THEATRE | 3.000 | A- | 11.010 |
| THEO 1000 | FAITH & CRITICAL REASON | 3.000 | A- | 11.010 |
| ZZRU ADVI | FRESHMAN ADVISING | 0.000 | S | .000 |
| Ehrs: | 16.000 QPts: | 53.340 | | |
| GPA-Hrs: | 16.000 GPA: | 3.334 | | |
| Fall 2012 | | | | |
| Fordham College/Rose Hill | | | | |
| Undeclared (Political Science) | | | | |
| GERM 1502 | INTERMEDIATE GERMAN II | 0.000 | W | .000 |
| PHIL 3000 | PHILOSOPHICAL ETHICS | 3.000 | A | 12.000 |
| PHYS 1201 | INTRO ASTRONOMY | 3.000 | A | 12.000 |
| POSC 2501 | INTRO INT'L POLITICS | 4.000 | B | 12.000 |
| THEO 3542 | CATHOLIC SOCIAL TEACHING | 3.000 | B+ | 9.990 |
| THEO 3870 | RELIGION AS HUMAN EXPERIENCE | 4.000 | A- | 14.680 |
| ZZRU ADV2 | SOPHOMORE ADVISING | 0.000 | S | .000 |
| Ehrs: | 17.000 QPts: | 60.670 | | |
| GPA-Hrs: | 17.000 GPA: | 3.569 | | |
| Spring 2013 | | | | |
| CLASS RANK IS 133 / 881 | | | | |
| Fordham College/Rose Hill | | | | |
| Theology Relig Studies | | | | |
| ANTH 1200 | INTRO TO PHYSICAL ANTHRO | 3.000 | A- | 11.010 |
| ENGL 3436 | AMERICAN DREAM IN LIT | 4.000 | A- | 14.680 |
| POSC 2102 | INTRO TO URBAN POLITICS | 4.000 | A | 16.000 |
| POSC 3610 | POL ECON OF DEVELOPMENT | 4.000 | A | 16.000 |
| THEO 3100 | INTRO TO OLD TESTAMENT | 3.000 | A- | 11.010 |
| Ehrs: | 18.000 QPts: | 68.700 | | |
| GPA-Hrs: | 18.000 GPA: | 3.817 | | |
| Dean's List | | | | |
| Fall 2013 | | | | |
| Fordham College/Rose Hill | | | | |
| Theology Relig Studies | | | | |
| GERM 1502 | INTERMEDIATE GERMAN II | 3.000 | A- | 11.010 |
| HIST 1220 | UNDRSTND HIST CHNGE: ANC ROME | 3.000 | B+ | 9.990 |
| THEO 3700 | SCRIPTURES OF THE WORLD | 3.000 | A | 12.000 |
| THEO 4848 | HUMAN NATURE AFTER DARWIN | 4.000 | A- | 14.680 |
| Ehrs: | 13.000 QPts: | 47.680 | | |
| GPA-Hrs: | 13.000 GPA: | 3.668 | | |
| Spring 2014 | | | | |
| Fordham College/Rose Hill | | | | |
| Theology Relig Studies | | | | |
| ZZSA 9100 | ADM STUDY ABROAD PLACEHOLD | 0.000 | - | .000 |
| Ehrs: | 0.000 QPts: | 0.000 | | |
| GPA-Hrs: | 0.000 GPA: | 0.000 | | |
| ********** CONTINUED ON PAGE 2 ********** | | | | |

PATRICK MAROUN

Anna Ponterosso
University Registrar
Director of Academic Records

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Course instruction at Fordham University is conducted in English with the exception of foreign language courses.

Date Issued: 19-MAY-2021 Page: 1

FORDHAM UNIVERSITY
THE JESUIT UNIVERSITY OF NEW YORK

**Lincoln Center Campus**
113 West 60th Street
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**Rose Hill Campus**
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**Westchester Campus**
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West Harrison, NY 10604
718-817-1000

**Name:** Patrick G. Maroun

**Student ID:** A09682323 **DOB:** 05-JUL **SSN:** *** - ** - 4939

**Previous Institution(s):**
FORDHAM UNIVERSITY Sep 2011 - May 2015

| COURSE # | COURSE TITLE | CRED | GRD | PTS |
|---|---|---|---|---|
| **Fall 2014** | | | | |
| | Fordham College/Rose Hill | | | |
| | Theology Relig Studies | | | |
| GERM 2100 | ADVANCED GERMAN GRAMMAR | 4.000 | B+ | 13.320 |
| POSC 3121 | NEW YORK CITY POLITICS | 4.000 | B+ | 13.320 |
| POSC 4210 | SEM:STATE, FAMILY & SOCIETY | 4.000 | A- | 14.680 |
| THEO 3833 | CHRISTIAN THOUGHT& PRACTICE II | 4.000 | A | 16.000 |
| | Ehrs: 16.000 QPts: | | | 57.320 |
| | GPA-Hrs: 16.000 GPA: | | | 3.583 |
| **Spring 2015** | | | | |
| CLASS RANK IS 251 / 735 | | | | |
| | Fordham College/Rose Hill | | | |
| | Theology Relig Studies | | | |
| GERM 3010 | FRISCH AUS DER PRESSE | 4.000 | A | 16.000 |
| THEO 3834 | CHRISTIAN THOUGHT&PRACTICE III | 4.000 | A | 16.000 |
| THEO 3860 | CONTEMP CONVERSTNS IN THEO | 4.000 | A | 16.000 |
| THEO 4950 | CHRISTIANITY &SEXUAL DIVERSITY | 4.000 | B | 12.000 |
| | Ehrs: 16.000 QPts: | | | 60.000 |
| | GPA-Hrs: 16.000 GPA: | | | 3.750 |
| Dean's List | | | | |
| ********** TRANSCRIPT TOTALS ********** | | | | |
| INSTITUTION | Ehrs: 113.000 QPts: | | | 399.670 |
| | GPA-Hrs: 113.000 GPA: | | | 3.537 |
| TRANSFER | Ehrs: 25.000 QPts: | | | 0.000 |
| | GPA-Hrs: 0.000 GPA: | | | 0.000 |
| OVERALL | Ehrs: 138.000 QPts: | | | 399.670 |
| | GPA-Hrs: 113.000 GPA: | | | 3.537 |
| ********** END OF TRANSCRIPT ********** | | | | |

| COURSE # | COURSE TITLE | CRED | GRD | PTS |
|---|---|---|---|---|

Anna Ponterosso
University Registrar
Director of Academic Records

Not considered official without Seal or Registrar's Signature
Course instruction at Fordham University is conducted in English with the exception of foreign language courses.

Date Issued: 19-MAY-2021 Page: 2

## FORDHAM UNIVERSITY
## EXPLANATION OF TRANSCRIPT

Coursework taken at Fordham University commencing with the Fall 1989 term is shown on this transcript (except MC and LT). Students with coursework completed prior to Fall 1989 have a second transcript of their academic record for the earlier period, which does not include the previous grade point average. Credits earned prior to Fall 1989 are reflected in initial statistics.

### *UNDERGRADUATE RECORDS:*

Beginning with the Fall 1989 term, the undergraduate schools CB (Gabelli School of Business, formerly known as the College of Business Administration), CL (Fordham College at Lincoln Center), FC (Fordham College at Rose Hill), and PC (Fordham School of Professional and Continuing Studies; formerly known as LS-Fordham College of Liberal Studies, IC-Ignatius College, SG-School of General Studies) have adopted the following grading system. In July 2002, Marymount College merged with Fordham University. The undergraduate schools of Marymount College were renamed Marymount College of Fordham University (MC) (formerly known as the Women's College) and Liberal Studies at Tarrytown (LT) (formerly known as Weekend College). Coursework commencing with the Fall 2002 term is shown on this transcript. Students with coursework completed prior to Fall 2002 have a second transcript of their academic record for the earlier period. Credits earned prior to Fall 2002 are reflected in initial statistics. The schools MC and LT adopted the same grading system listed below.

| *Fall 2009 & after* Grade | Quality Points | *Fall 1989 - Fall 2009* Quality Points | Approximate Percent *(The use of approximate percent is at the discretion of the instructor)* |
|---|---|---|---|
| A | 4.00 | 4.0 | 93-100 |
| A- | 3.67 | 3.7 | 90-92 |
| B+ | 3.33 | 3.3 | 87-89 |
| B | 3.00 | 3.0 | 83-86 |
| B- | 2.67 | 2.7 | 80-82 |
| C+ | 2.33 | 2.3 | 77-79 |
| C | 2.00 | 2.0 | 73-76 |
| C- | 1.67 | 1.7 | 70-72 |
| D | 1.00 | 1.0 | 60-69 |
| F | 0.00 | 0.0 | Failure |
| AF | 0.00 | 0.0 | Excessive Absence Failure (PC only) |
| WF | 0.00 | 0.0 | Withdrawal Failure |
| P / F | 0.00 | 0.0 | Pass/Fail Option |

### *GRADUATE RECORDS:*

**GA** - *Graduate School of Arts & Sciences*

| *Fall 2009 & after* Grade | Quality Points |
|---|---|
| A | 4.00 |
| A- | 3.75 |
| B+ | 3.50 |
| B | 3.00 |
| B- | 2.75 |
| C | 2.00 |
| F | 0.00 Failure |
| FCE / FCP | 0.00 Failed Comprehensive exam/Capstone |
| PCE / PCP | 0.00 Passed Comprehensive exam/Capstone |
| HPCE / HPCP | 0.00 High Pass Comprehensive exam/Capstone |
| HDCE | 0.00 High Pass with Distinction Comprehensive exam |
| PREP | 0.00 Preparation for Comprehensive Exam |
| AP | 0.00 Adequate progress - Ph.D. only |
| LP | 0.00 Lack of progress - Ph.D. only |
| WF | 0.00 Withdrawal Failure |
| PI / FI | 0.00 Passing Incomplete/Failing Incomplete (temporary grade) |

| *Prior to Fall 1994* Grade | Quality Points |
|---|---|
| A | 4.0 |
| B+ | 3.5 |
| B | 3.0 |
| C | 2.0 |
| F | 0.0 Failure |

| *Fall 1994 - Summer 2009* Grade | Quality Points |
|---|---|
| A | 4.0 |
| A- | 3.7 |
| B+ | 3.5 |
| B | 3.0 |
| B- | 2.7 |
| C | 2.0 |
| D | 1.0 |
| F | 0.0 Failure |

| Grade | Quality Points |
|---|---|
| P | 0.00 Pass |
| HP | 0.00 High Pass* |

**Fall 2018 and after*

**GP** - *PCS Division of Graduate Studies*

| Grade | Quality Points |
|---|---|
| A | 4.00 |
| A- | 3.67 |
| B+ | 3.33 |
| B | 3.00 |
| B- | 2.67 |
| C+ | 2.33 |
| C | 2.00 |
| C- | 1.67 |
| D | 1.00 |
| F | 0.00 Failure |
| AF | 0.00 Excessive Absence Failure |
| WF | 0.00 Withdrawal Failure |
| P / F | 0.00 Pass/Fail Option |

**GS** - *Graduate School of Social Service*
**GR** - *Graduate School of Religion and Religious Education*

| Grade | Quality Points |
|---|---|
| A | 4.00 |
| A- | 3.75 |
| B+ | 3.50 |
| B | 3.00 |
| B- | 2.75 |
| C+ | 2.50 (GS Only) |
| C | 2.00 |
| F | 0.00 Failure |
| IW | 0.00 Permanent Incomplete (GS Only) |
| P / F | 0.00 Pass/Fail Option |

**GE** - *Graduate School of Education*

***The programs offered by the Graduate School of Education are approved by the National Council of Accreditation of Teacher Education.***

| Grade | Quality Points |
|---|---|
| A | 4.00 |
| A- | 3.70 |
| B+ | 3.50 |
| B | 3.00 |
| B- | 2.70 |
| C+ | 2.50 |
| C | 2.00 |
| F | 0.00 Failure |
| P / F | 0.00 Pass/Fail Option |

**GB** - *Gabelli School of Business (Graduate)*

| *Fall 2015 & after* Grade | Quality Points | Grade | Quality Points |
|---|---|---|---|
| A | 4.00 | C+ | 2.33 |
| A- | 3.67 | C | 2.00 |
| B+ | 3.33 | C- | 1.67 |
| B | 3.00 | D | 1.00 |
| B- | 2.67 | F | 0.00 Failure |
| | | P / F | 0.00 Pass/Fail Option |

| *Fall 1990 - Summer 2015* Grade | Quality Points |
|---|---|
| A | 4.00 |
| B+ | 3.50 |
| B | 3.00 |
| C | 2.00 |
| D | 1.00 |
| F | 0.00 Failure |

| *Prior to Fall 1990* Grade | Quality Points |
|---|---|
| H | 4.00 Honors |
| HP | 3.00 High Pass |
| P | 2.00 Pass |
| MP | 1.00 Marginal Pass |
| F | 0.00 Failure |

The grades of W (Withdrew), ABS (Absent from Final Examination, temporary grade), INC (Incomplete, temporary grade), NGR (No Grade Reported, temporary grade), S (Satisfactory), U (Unsatisfactory), IP (In Progress), AUD (Audit) may be used by ALL schools. Grades prefixed with the letter T indicate credits transferred from another institution.

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*AR July 2020*

January 24, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I am writing in support of Pat Maroun application to become a law clerk. I have worked with Pat since he joined our firm — he is developing into a strong lawyer with a range of skills that would serve any federal judge well — he is a strong writer and an excellent colleague.

Pat has worked with me on several different matters, and he has a wide range of legal interests. For example, Pat was one of the lead young associates on my representation of Capital One in an investigation into its cyber breach. Pat was a strong and dedicated team member, from working on the investigative team's marshaling of the facts and the law, to coordinating on important legal issues related to regulatory oversight and to the application of attorney-client and work product privileges of our investigation. Pat has also jumped in to work on a pro bono trial of a criminal defendant charged with violent offenses, that went to trial this fall. Pat handled key research and trial preparation – and our client was acquitted of all but one charge and walked out the door. Throughout the pandemic, Pat has worked tirelessly on all aspects of our client's case and our great result is due to the efforts of a fantastic team, including Pat.

More than just being smart and working hard, what sets Pat apart from many candidates is his wise and calm exercise of judgment and true dedication and commitment to his work. Pat wants to be the very best lawyer, but in a very modest and appealing way. He is a wonderful colleague with a great sense of humor. I believe that any judge would be fortunate to work with Pat even among the always strong group of candidates available.

Please contact me if you have any questions.

Sincerely,

Helen V. Cantwell

Helen Cantwell - hcantwell@debevoise.com - 212-909-6312

**UNIVERSITY OF MICHIGAN LAW**
625 South State Street
Ann Arbor, Michigan 48109-1215

Patrick Barry
Clinical Assistant Professor of Law
Director of Digital Academic Initiatives

January 24, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I hired Pat Maroun as a research assistant in the winter of 2018. I had high expectations, given how well he performed in my “Editing and Advocacy” class the previous fall. Pat exceeded every one of them.

If I asked for an assignment by Friday, he would get it to me by Thursday. If I asked him to come up with at least two solid ways to improve a project, he would come up with more like five. All would be incredibly helpful.

He also had an uncanny ability to anticipate what I wanted even before I was able to articulate it. Several times he took ill-formed directions on my part and turned them into a deliverable that was exactly what I was hoping for but hadn’t yet been able to express. I am not saying he will be able to read your mind, but I am saying he’ll be able to come pretty darn close—in a good way.

In addition, he’ll bring to chambers an endearingly nerdy love of language in general and of statutory interpretation in particular. Part of this comes from the time he spent studying Latin in college; part, too, comes from is fondness for puzzles. If you ever need to “phone-a-friend” while doing the New York Times crossword puzzle on Sunday, he’d be a great choice.

In fact, not only would he’d likely guide you to the right answer; he’d also treat you to an engaging conversation. That’s because his interests are wide-ranging —jazz, sports, the writings techniques of famous Supreme Court justices—and his disposition is always generous and welcoming. On top of this, he has a wonderful combination of conscientiousness and charm. The conscientiousness means you can always count on him to hit deadlines. The charm means that he is really fun to have around.

For all these reasons and many more I would be happy to share should you wish to give me a call (734.763.2276), I strongly recommend you consider him for one of your clerkship positions. Pat is bright. He is hardworking. He is creative and warm and funny. He is, in short, exactly the type of young attorney I’d want helping me with a full docket of cases.

Sincerely,

Patrick Barry
Director of Digital Academic Initiatives
Clinical Assistant Professor of Law

**University of Michigan Law School**
625 S. State St.
Ann Arbor, MI 48109

*Gabriel Rauterberg*
*Assistant Professor of Law*
*rauterb@umich.edu; 203-606-6754*

January 22, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I write with great enthusiasm to recommend Patrick Maroun for a clerkship with your chambers. Patrick was an excellent student with outstanding analytical abilities, impressive research skills, and a thoughtful temperament. He is now in the early stages of his legal career with a practice focused on white collar investigatory work and commercial litigation.

I first met Patrick as a student in my Enterprise Organization class (what Michigan calls its basic "business organizations" class). Patrick stood out as a student who consistently followed the difficult material with understanding and curiosity. He was reflective, focused, and asked questions that were both probing and conveyed mastery of the material. On an exam that tested a range of substantive knowledge, applications, and policy analysis, Patrick's performance was outstanding. He received an "A." Indeed, in a class of fifty-something students, Patrick had the second highest grade. In general, Patrick flourished at Michigan Law School. He graduated cum laude with an impressive 3.688 GPA. He was the Executive Editor of the Michigan Law Review and published a note in the law review.

Patrick also served as my research assistant. I asked him if he might be interested because I was so impressed with his class exam. As a research assistant, he showed great diligence and legal acumen. Patrick joined me as part of a project involving the empirical and legal analysis of complex governance arrangements in newly public corporations. He excelled in a range of different tasks, including analyzing extremely complex governance provisions disclosed through corporations' filings with the SEC; researching case law governing directors' ultra vires actions; and exploring the distinct treatment of fiduciary duties across a range of organizational forms. Patrick consistently provided valuable analysis that concisely and effectively distilled the issues of interest. What he accomplished every few weeks equaled what some other students accomplish in an entire semester.

Patrick is also a pleasure to interact with personally. He is affable, interesting, and curious, but also driven and ambitious. Perhaps most importantly, he couples his analytical prowess with a desire to serve society. The evidence is there in his year with AmeriCorps in Denver, in his law school work with our Unemployment Insurance Clinic, and in his internship with the U.S. District Court for the District of Massachusetts. Patrick has the right intellectual capacities and legal knowledge to effectively analyze the law, but he also has the right temperament to exercise good judgment as a clerk.

In sum, I think that Patrick would prove an exceptional addition to your chambers. Please let me know if I could be of any further assistance as you make your decision.

Sincerely,

Gabriel Rauterberg

Patrick G. Maroun
112 West 80th Street, Apt 3R, New York, NY 10024 • 781.752.8301 • pgmaroun@umich.edu

## Writing Sample

**Brief in Support of Motion for Compassionate Release**
I prepared this writing sample while representing a *pro bono* client in connection with his previously filed motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). I wrote and edited this draft, although I did incorporate some stylistic comments from more senior associates. The version of this brief that was ultimately filed was edited internally and by local counsel.

**JOHN T. HUNTER, JR.'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS MOTION FOR COMPASSIONATE RELEASE**

John T. Hunter, Jr. submits the following brief in further support of his motion pursuant to § 18 U.S.C. § 3582(c)(1)(A)(i). We also request oral argument on this motion for an order reducing his sentence based on the "extraordinary and compelling reasons" discussed below.

## INTRODUCTION

John T. Hunter, Jr. is currently serving a 317-year sentence in federal prison. Most of this extraordinarily long sentence, imposed in 1995, is the result of 305 years of consecutive, mandatory sentences for 16 violations of 18 U.S.C. § 924(c), all of which were charged in a single indictment. Because of an application of § 924(c) that Congress never intended and has since repudiated, all but one of Hunter's § 924(c) convictions were subject to a sentencing enhancement intended to address recidivism, despite Hunter having no prior criminal history. Hunter received a plea offer of 40 years, but instead, chose to exercise his right to trial. He was convicted, and due to the many "stacked" § 924(c) counts, this Court was required to impose a sentence that is effectively three mandatory life sentences without parole. This sentence is far out of step with what is typical for armed robbery and, indeed, far greater than sentences typically imposed for murder.

Congress recognized in 2018 that the misapplication of § 924(c) resulted in sentences like Hunter's, which are much longer than necessary or just. The amended statute makes clear that additional § 924(c) counts in a single indictment are not "second or subsequent" convictions subject to an enhanced penalty. While Congress did not make this change retroactive, in the same act, it amended the compassionate release statute, 18 U.S.C. § 3582(c)(1)(A)(i), to remove the Bureau of Prisons ("BOP") as a gatekeeper, allowing defendants to file their motions directly. When it amended the compassionate release statute, Congress intended for defendants

like Hunter to demonstrate that they are deserving of a second chance and for *courts* to make decisions on a case-by-case basis.

Hunter is a changed man who has spent his 27-years of incarceration bettering himself in the hope that he may someday be released. Under *Gunn* and *Thacker*, decided after this motion was initially briefed, this Court is empowered to grant Hunter the second chance he deserves. If given that chance, he will not squander it. For the reasons set forth below, we respectfully move this Court to grant Hunter's motion for a reduced sentence.

## PROCEDURAL HISTORY

On August 9, 2019, Hunter filed a *pro se* motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), arguing the extraordinarily long sentence he received as a result of "stacked" § 924(c) counts, the disparity between his sentence and the average sentence for armed robbery, the sentencing penalty he faced for forcing the government to meet its evidentiary burden at trial, his significant efforts at rehabilitation, and his good disciplinary record constitute extraordinary and compelling reasons warranting a sentence reduction. Def's Mot., ECF No. 197. On January 24, 2020, the government filed its opposition, arguing Hunter's sentence cannot be reduced because the First Step Act is not retroactive[1] and "left unchanged a critical statutory command" that "any reduction must be 'consistent with [U.S.S.G. § 1B1.13].'" Gov.'s Resp. 3, ECF 208. On February 10, 2020, Hunter filed a *pro se* reply to the government's opposition. Def.'s Reply, ECF 209. On July 26, 2021, this Court granted counsel leave to file this supplemental brief supporting Hunter's motion. Notification Docket Entry, ECF No. 218.

On November 20, 2020, the Seventh Circuit held in *United States v. Gunn*, 980 F.3d 1178, 1180–81 (7th Cir. 2020), that district courts have the authority to grant defendants'

[1] The government also noted that, if Hunter were sentenced today, his mandatory sentence would still be extraordinarily long. As explained below, Hunter's hypothetical sentence under the new law does not set a floor for reducing his sentence if his motion is granted.

motions for compassionate release unconstrained by U.S.S.G. § 1B1.13 because the policy statement is not "applicable" to "[defendant]-initiated applications for compassionate release." *See also United States v. Wrice*, 834 Fed. App'x 267, 268 (Mem.). In June 2021, the Seventh Circuit explained that the First Step Act's changes to § 924(c) and the stark sentencing disparities they created are relevant and appropriate factors for a district court to consider in connection with a motion for a sentence reduction. *United States v. Black*, 999 F.3d 1071, 1074–76 (7th Cir. 2021). Most recently, in *Thacker*, the Seventh Circuit clarified that the appropriate place for courts to consider those disparities is under the 18 U.S.C. § 3553(a) sentencing factors. *United States v. Thacker*, – F.4th –, No. 20-2943, 2021 WL 2979530, *5–6 (7th Cir. July 15, 2021).

**ARGUMENT**

Hunter's 317-year sentence, which is the result of 305 years of "stacked" mandatory, consecutive sentences, is egregiously harsh. Congress has ended the misapplication of § 924(c) that enabled Hunter's extraordinarily long sentence, and it has granted this Court the authority to correct his disproportionate sentence through the amended § 3582(c)(1)(A)(i). In 2018, Congress recognized that this statute, commonly known as the compassionate release statute, was being used too sparingly. The First Step Act expanded compassionate release by eliminating the need for defendants to rely on the BOP to file motions on their behalf. The Seventh Circuit has explained that, under the amended statute, a district court may consider "extraordinary and compelling" reasons in a defendant-filed motion unconstrained by the policy statement.

In Hunter's case, the sheer number of § 924(c) counts with which he was charged, the penalty paid for exercising his constitutional right to trial, his family circumstances, and his remarkable personal rehabilitation, taken together, are extraordinary and compelling reasons warranting a sentence reduction. As explained below, the § 3553(a) sentencing factors, including

the extraordinary length of Hunter's sentence, the disparity between the sentence Hunter received and the one he would receive today, his laudable rehabilitation while incarcerated, and the fact that he would not be a danger to society if released weigh heavily in favor of reducing Hunter's sentence. Further, this Court is not limited in how much it can reduce Hunter's sentence by the current mandatory minimums.

**A. The Court has Authority to Grant the Relief Hunter Requests**

A district court has the authority to reduce a term of imprisonment when there are "extraordinary and compelling reasons" warranting the reduction, as determined by the sentencing court. *See* 18 U.S.C. § 3582(c)(1)(A)(i) (2002), *amended by* First Step Act of 2018, Pub. L. No. 115–391, § 603, 132 Stat. 5194. Such a reduction—often referred to as compassionate release—may only be made upon motion to the sentencing court, and prior to the First Step Act, only the BOP could make such a motion. With the BOP as gatekeeper, these motions were exceptionally rare. *See United States v. Brooker*, 976 F.3d 228, 231 (2d Cir. 2020).

In 2018, Congress amended the compassionate release statute to empower the sentencing court to reduce a sentence upon motion of the defendant, provided the "defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility." 18 U.S.C. § 3582(c)(1)(A). On April 7, 2019, Hunter made a request to Warden T.G. Werlich for consideration of compassionate release, which was rejected the next day. Hunter requested reconsideration of the Warden's decision and received no response. Def's Mot. 2. On August 9, 2019, after waiting more than 30 days since his request, Hunter filed his *pro se* motion; thus, this Court has the authority to grant relief.

Since the initial briefing on this motion, the Seventh Circuit has flatly rejected the government's argument that the Sentencing Commission's policy statement at § 1B1.13 limits

the extraordinary and compelling reasons a court may consider in defendant-initiated motions. *Contra* Gov.'s Opp'n 8, 10. In *Gunn,* the Seventh Circuit explained that the Sentencing Commission has not issued any guidelines "applicable" to defendant-initiated motions, and as such, U.S.S.G. § 1B1.13 "does not curtail a district judge's discretion." 980 F.3d at 1180.

Thus, there is no longer any dispute that this Court has the authority to consider the "extraordinary and compelling" reasons Hunter raised in his motion for a sentence reduction.

**B. Hunter Has Presented Extraordinary and Compelling Reasons Warranting Compassionate Release**

Whether extraordinary and compelling reasons exist is an individualized determination committed to this Court's discretion. Though Congress stopped short of *automatically* reducing the sentences of every person convicted under § 924(c) and sentenced to stacked mandatory minimums, courts are still "empowered to relieve some defendants of those sentences on a case by case basis." *Black*, 999 F.3d at 1075–76 (quoting *United States v. McCoy*, 981 F.3d 271, 287 (4th Cir. 2020)). "[S]uch discretion is inherent in the compassionate release statute and process." *Id.* Though district courts in the Seventh Circuit cannot presently consider the length of a defendant's sentence an extraordinary and compelling reason, *Thacker*, 2021 WL 2979530, at *6, the unusual aspects of Hunter's case, taken as a whole, constitute extraordinary and compelling reasons. *See United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021) (holding a district court may find extraordinary and compelling reasons warranting compassionate release "based on its individualized review of all the circumstances of [a defendant's] case"). Therefore, this Court may consider the excessive length of Hunter's sentence to under the § 3553(a) factors.

1. *The Excessive Number of § 924(c) Counts*

As discussed in another decision in this district, this Court "must determine on its own whether the circumstances here qualify as extraordinary and compelling reasons as those words

are commonly used." *United States v. Rollins*, No. 99-CR-771-1, 2021 WL 1020998, *3 (N.D. Ill. March 17, 2021) (internal quotations and citations omitted) (citing *United States v. Melvin*, 948 F.3d 848, 852 (7th Cir. 2020). The sheer number of § 924(c) counts Hunter was charged with and convicted of is extraordinary. Those **16** counts are far "beyond what is usual, customary, regular, or common" for a first-time offender like Hunter. *Id.* at *4. Per a 2018 report, of the 1,976 defendants convicted of a § 924(c) count in 2016, only 156 (approximately 7.9%) were convicted of multiple counts, and only 14 (approximately 0.7%) were convicted of three or more counts. The greatest number counts of which any single defendant was convicted in 2016 was 11.[2]

Hunter's draconian sentence is the result of the extraordinary charging decision by the prosecutor in his case, not merely a mechanistic application of federal mandatory sentences. Even before the First Step Act, Hunter's case was an outlier. As discussed below, accomplishing a sentence reflective of the seriousness of Hunter's crimes did not require charging him with 16 counts, and federal charging and sentencing decisions have goals beyond racking up the most convictions possible or the longest sentences available. That much is made clear by the very existence of the plea-bargaining system that resolves the vast majority of federal criminal cases. The noteworthy charging decision in Hunter's case does not make him any less culpable for his conduct, but it illustrates one of the many ways Hunter's case stands out as particularly extreme. The "extraordinary" nature of these excessive counts is difficult to ignore.

2. *Hunter's Extraordinary Trial Penalty*

Relatedly, the circumstances of Hunter's decision to go to trial were highly unusual. The Supreme Court has long acknowledged the permissibility of plea bargaining on the theory that

[2] United States Sentencing Commission, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* 19–20 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf.

there is a "mutuality of advantage." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (internal quotation marks omitted) (quoting *Brady v. United States*, 397 U.S. 742, 752 (1970)). The defendant receives a reduced sentence resulting from fewer or less serious charges, and the government avoids the time and expense of trial. Our system implicitly accepts that defendants who reject those bargains give up the beneficial charging they would have received when they force the government to meet its evidentiary burden at trial. But this does not mean that, in rare situations, the circumstances of an individual's plea offer and the penalty paid for rejecting it cannot be extraordinary and compelling reasons warranting a sentence reduction.

Due to the state of the law in 1995, Hunter was faced with an extreme version of "charge piling,"[3] whereby the government charged him with **16** violations of § 924(c). Because of the incorrect interpretation of § 924(c)'s anti-recidivism provision, even a plea deal that dropped the vast majority of the firearms charges would not have provided much benefit. Prior to trial, the government offered Hunter a 40-year plea deal, which would mean the government would have needed Hunter to plead guilty to just <u>two</u> of the § 924(c) counts it had charged him with.[4] For Hunter, then only 27 and with no prior record, a 40-year sentence was like signing away his life. Indeed, such a plea would have resulted in a sentence twice the length of that typical for murder.[5]

The reality is that the misapplied sentence enhancement destroyed the mutuality of advantage in Hunter's plea negotiations because any § 924(c) count beyond the second became superfluous for the government. By allowing Hunter to plead guilty in exchange for a "reduced" sentence, the government could achieve its desired outcome (an extraordinarily long sentence)

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3 *See generally* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 Colum. L. Rev. 1303 (2018).

4 Resulting from a 25-year mandatory sentence for the § 924(c) counts running consecutively with the sentence for the underlying bank robberies.

5 *See* United States Sentencing Commission, *Sentence Imposed by Type of Crime* (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/Table15.pdf.

without having to go to trial or give up anything at all.[6] Faced with being incarcerated for most of his life whether or not he accepted a deal, it is unsurprising that Hunter forced the government to prove its case. Had the law been applied as Congress has made clear it was always intended to be, the government would have been forced to make Hunter a mutually beneficial plea offer that presented a legitimate choice between a meaningfully reduced sentence and forcing the government to convince a jury. Not only was this situation unusual, but it was also deeply unjust.

3. *Hunter Intends to Serve as His Elderly Mother's Caregiver*

The Court should also consider that Hunter will be his mother's caregiver if released. *See* Ex. 1, Letter from Dorothy Hunter. While the Guidelines are not binding, they are instructive of the kinds of circumstances that may be deemed extraordinary and compelling. *See Gunn*, 980 F.3d at 1180. Under the Guidelines, a defendant's family circumstances are an extraordinary and compelling reason when the defendant is the only available caregiver for a child, spouse, or registered partner. U.S.S.G. § 1B1.13. However, there is "no reason to discount this unique role simply because the incapacitated family member is [the defendant's mother] and not a spouse." *United States v. Bucci*, 409 F. Supp. 3d 1, 2–3 (D. Mass. 2019) (finding that the defendant had demonstrated extraordinary and compelling reasons where he intended to care for his mother).

Hunter's mother is 88 years old and lives alone despite having health issues, including a sciatic nerve condition. *See* Ex. 1. For more than 27 years, she has been without her husband, who was incarcerated since 1993 and recently passed, so she must rely on her children for assistance. Hunter's sister lives in California and is unable to care for their mother. *See* Ex. 2, Letter from Debbie Smearer. His brother and other sister live nearby, but due to their other obligations are not able to provide her with daily assistance. Ex. 1. If Hunter were released, he would live in his mother's home and assist her with the day-to-day tasks that become more

[6] *Id.* at 1310–16.

difficult with her age and the pain associated with her sciatic nerve condition. Ex. 1. While Hunter may not be the only person available to his mother, the occasional visits are different in kind from the daily care that Hunter will provide his mother upon release.

4. *Hunter's Rehabilitation*

Hunter today is not the person he was 27 long years ago. During his long incarceration, Hunter has channeled his energy into constructive pursuits that have fostered his intellectual curiosity and advanced his vocational skills. He has not had a disciplinary infraction in 12 years, and his record as a model inmate resulted in a transfer to a lower-security facility. Given the length of his sentence, it would have been easy for Hunter to despair. Instead, he has continuously made efforts to improve himself, preparing for life on the outside, even though the possibility of his release has always been remote. This is a testament to his good character and the man that he has become.

While rehabilitation alone cannot be an extraordinary and compelling reason, 28 U.S.C. § 994(t), the Court may properly consider it in conjunction with other factors as part of a holistic analysis. *See Rollins*, 2021 WL 1020998, at *5 ("Given the[] use of the qualifier[] "alone" [§944(t)] plainly indicate[s] that while rehabilitation cannot stand on its own as an extraordinary reason for a reduced sentence, it can play a supporting role in the analysis."); *see also United States v. Williams*, No. 06-CR- 5005-(1), 2020 WL 6940788, *4 (N.D. Ill. Nov. 25, 2020) (finding "support for a sentence reduction in [the defendants'] records of rehabilitation while in prison").

**C. The Criteria for Reassessing the Length of Hunter's Sentence Weigh Strongly in Favor of a Sentence Reduction**

When deciding a motion for relief under 18 U.S.C. § 3582(c)(1)(A)(i), a court should also consider the other sentencing factors, including the defendant's rehabilitation, his history and

characteristics, and other factors that bear on who the defendant is today. *See* U.S.S.G. § 1B1.13 (requiring consideration of, *inter alia*, the factors set forth in 18 U.S.C. § 3553(a)). In *Black*, the Seventh Circuit held that district courts may properly consider the sentencing disparities created by the First Step Act, "which reflects a substantially different view by Congress on how to punish violations of § 924(c)," in weighing the § 3553(a) factors. 999 F.3d at 1076; *see also Thacker*, 2021 WL2979530, at *6. Congress's decision to make § 403 of the First Step Act non-retroactive "does not imply that district courts may not consider those legislative changes when deciding individual motions for compassionate release." *Black*, 999 F.3d at 1075. The relevant factors, taken as a whole, support a reduction to Hunter's sentence.

1. *The Unjust Sentencing Disparity*

Since the initial briefing in this case, there has been significant development in the law on the issues at the heart of Hunter's motion. Two circuit courts and more than one hundred district courts have held that the severity of stacked § 924(c) counts and the disparity between the sentences imposed and the ones that would be received today constitute extraordinary and compelling reasons.[7] While the Seventh Circuit recently disagreed with those circuits, in the same decision, it reaffirmed that district courts may consider the sentencing disparity created by the First Step Act as part of their § 3553(a) analysis "upon a finding that the [defendant] has supplied" extraordinary and compelling reasons. *Thacker*, 2021 WL 2979530, at *5–6.

The combination of Hunter's exceptionally long 305-year mandatory minimum sentence and the disparity between it and the one he would receive today weigh heavily in favor of granting relief. *See Rollins*, 2021 WL 1020998, at *3–5 (reducing a defendant's 106-year

[7] *See Maumau*, 993 F.3d at 837; *McCoy*, 981 F.3d at 286; *see also Brooker*, 976 F.3d at 238; *United States v. Owens*, 996 F.3d 755, 763 (6th Cir. 2021). *But see United States v. Jarvis*, 999 F.3d 442, 445–46 (6th Cir. 2021).

sentence due to its unusual length and the rarity of prosecutors bringing three or more § 924(c) counts against a first-time offender); *Williams*, 2020 WL 6940788, at *4 (citing the defendants' "extraordinarily severe" penalties as a reason supporting sentence reduction); *United States v. Peoples*, No. 98-cr-55(3), 2021 WL 2414102, *9 (N.D. Ind. June 14, 2021) (citing the 49-year disparity between the sentence defendant would receive today and what he actually received); *see also Black*, 999 F.3d at 1076 (citing *Rollins* with approval).

Hunter's sentence is nearly three times longer than the sentence at issue in *Rollins*, but the result is the same: Hunter is serving a *de facto* life sentence that is seriously out of step with the sentences of similarly situated defendants. The sentence imposed on Hunter is 15 times the length of an average sentence for murder, 36 times the length of an average sentence for robbery, and 79 times the length of an average sentence for firearms offenses.[8] Hunter's mandatory sentence is more than 200 years longer than the one he would receive if he were convicted of the same offenses today; that is an "exceptionally dramatic" disparity. *McCoy*, 981 F.3d at 285.

2. *Hunter's Rehabilitation Is Remarkable*

Hunter's remarkable personal rehabilitation and good behavior while incarcerated weigh strongly in favor of a reduced sentence.[9] After 27 years in prison, Hunter is not the same man, and an examination of who Hunter is today "provides 'the most up-to-date picture' of his

[8] *See* United States Sentencing Commission, *Sentence Imposed by Type of Crime* (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/Table15.pdf.

[9] *See, e.g.*, *Marks*, 455 F. Supp. 3d at 33 (recognizing the "ample evidence that [defendant] has made a positive turnaround in his life," including his completion of numerous educational courses and programs, positive work reports, and the positive impact he had on other inmates, as supporting a finding of extraordinary and compelling reasons); *United States v. Millan*, 91-CR-685 (LAP), 2020 WL 1674058, at *9 (S.D.N.Y. Apr. 6, 2020) (granting a sentence reduction under § 3582(c) to a defendant who ran a drug trafficking organization, given that "[the defendant], in the face of a life sentence, assumed a positive outlook and attitude towards life, sought to improve himself to the utmost extent possible and was motivated to do so notwithstanding his circumstances"); *See United States v. Cantu-Rivera*, No. CR H-89-204, 2019 WL 2578272, *2 (S.D. Tex. June 24, 2019) (recognizing the "extraordinary degree of rehabilitation" defendant accomplished as a factor justifying the reduction in his sentence).

character." *United States v. Harris*, No. 97-399, 2020 WL 7861325, at *15 (E.D. Pa. Dec. 31, 2020) (quoting *Pepper v. United States*, 562 U.S. 476, 492 (2011)). Hunter acknowledges the seriousness of his crimes and takes full responsibility for them. We respectfully suggest that the nearly three decades Hunter has already served reflect that seriousness and are sufficient to achieve the goals of sentencing set forth in 18 U.S.C. § 3553(a)(2).

During his time in prison, Hunter has transformed himself, despite having a sentence three times longer than he could reasonably expect to live. He has continued his education and developed numerous vocational skills through classes on computer skills, financial planning, psychology, and Spanish language, among other subjects. Outside the classroom, he has sought out a broad range of experiential training, including in tailoring, cooking, and plumbing installation. While in Virginia, Hunter was employed for more than four years at Unicor textile factories. Hunter has spent thousands of hours on these constructive activities. Hunter's disciplinary record also evidences his transformation: He has zero disciplinary incidents for the last 12 years, and his good behavior resulted in his transfer to a medium-security facility.

3. *Hunter Has the Support and Community Connection Required for Successful Reintegration*

Hunter has a loving and dedicated family that is committed to helping him reintegrate into his community. Despite his many years in prison, Hunter has maintained close relationships with his family and speaks with them often. Hunter's sister says that he has been "like a father" to her, providing emotional support and advice. Ex. 2. Just as Hunter has been there for his family, they are prepared to assist him in reintegrating into society. If released, Hunter would live with his mother and have the emotional, social, and financial support of his sisters and brother. Ex. 1; Ex. 3, Letter from Maria Nashalman; Ex. 4, Letter from David Hunter. His sister has also offered to assist Hunter in finding stable employment. Ex. 3. These strong family ties

root Hunter to the community and provide him with resources he needs to acclimate to life after prison. Hunter is intent on contributing positively to his community once on the outside. And, with the support of his family, he will do just that if your Honor grants him the chance.

4. *Hunter Is Not a Danger*

Hunter no longer poses a danger to any other person or society at large. His character development while in prison has been remarkable, and the BOP has acknowledged that development by transferring him to a facility with lower security and more privileges. For twelve years, Hunter has not had a single infraction. He has accomplished all of this despite his 317-year, *de facto* life sentence, which might have discouraged others from taking the positive steps that Hunter has taken. Further, as he raised in his *pro se* motion, Hunter's age makes him unlikely to repeat the mistakes he made as younger man. Def.'s Mot. 6. Research suggests that Hunter, who is 55 years old and has a Criminal History Category of I, is highly unlikely to recidivate.[10] If Hunter were released, the Court can be confident that he would not reoffend.

**D. Hunter's Mandatory Sentence in a Hypothetical Sentencing Under Current Law Does Not Prohibit Compassionate Release**

The government argues granting the relief Hunter requests would be inappropriate because Hunter would still receive a 112-year mandatory minimum sentence under the amended § 924(c).[11] The government's calculation mistakenly assumes Hunter would be subject to an enhanced sentence for "brandishing" a firearm under § 924(c)(1)(A)(ii). Under *Alleyne v. United States*, 570 U.S. 99, 115 (2013), such an enhancement is only permissible if the jury has found

[10] United States Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders*, December 2017, 25 fig. 22, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf (showing that Category I offenders aged 50-59 at time of release had a re-arrest rate of 16.1%, the second lowest of any group of offenders in the study.)

[11] The Government reaches this number by stacking 7-year sentences for each of the § 924(c) counts.

that fact beyond a reasonable doubt. Because Hunter's trial occurred long before *Alleyne* was decided, there was no such finding in this case.[12] Further, Congress has made clear, and many courts have observed, that § 3582(c)(1)(A) does not call for resentencing based on today's mandatory minimums. Instead, it provides that courts should subject the sentence initially imposed to a "second look" in light of changed circumstances. While both initial sentencings and sentence reductions require a judge to examine the § 3553(a) factors, they are fundamentally different exercises. When reducing a sentence pursuant to § 3582(c)(1)(A), the Court must determine the appropriate sentence for the person the defendant *has become* over the many years since the initial sentence was imposed.

Treating the 80-year mandatory sentence that could be imposed on Hunter today as a floor for his sentence reduction misapplies the First Step Act. As the government correctly points out in its opposition to Hunter's *pro se* motion, Congress did not make the First Step Act's adjustments to mandatory sentences under § 924(c) retroactive. But applying the government's theory would effectively do just that. That theory also assumes Hunter would have been charged and convicted of all 16 § 924(c) counts today, which requires a leap of faith elided by the government's seemingly straightforward assertion that Hunter would face a 112-year mandatory sentence under current law. It is not obvious the government would make the same charging decision today that it made in 1993 under different directives.[13] And even if it did, without the

---

[12] *See, e.g.*, *United States v. Guarascio*, No. 5:04-cr-45-BO (E.D.N.C. Nov. 25, 2020), ECF No. 243, at 7 (if the fact of "whether the firearm was brandished was not decided by the jury," a defendant sentenced today would face "stacked five-year mandatory minimum sentences," not seven years on each count); *United States v. Ezell*, No. 02-815-01, 2021 WL 510293, at *4 n.5 (E.D. Pa. Feb. 11, 2021) (defendant could not be sentenced today to more than five years on each § 924(c) count because the jury did not find that he had brandished a firearm).

[13] *See e.g.*, Memorandum from Attorney General Eric Holder to the United States Attorneys and Assistant Attorney General for the Criminal Division (Aug. 12, 2013) (reiterating that charging decisions are matters of discretion committed to prosecutors sound judgment, federal resources, and the *current priorities* of the Department of Justice).

sentencing enhancement, the government would have had to offer Hunter a mutually advantageous plea—and he may have accepted it. *See Black*, 999 F.3d at 1075 ("Any such calculations involve speculation about how the court might have sentenced him (and even how he might have been charged) under a quite different set of sentencing provisions."). Hunter does not ask this Court to speculate on how he might have been charged or what he may have been convicted of. He simply asks it to ignore the government's speculative assertions in this vein.

If the Court were to grant Hunter's motion, it would in no way be limited by the hypothetical mandatory sentence Hunter could receive today. We respectfully submit that a reduction below the current mandatory minimum would best serve the ends of justice.[14]

**CONCLUSION**

For the foregoing reasons, and for the reasons laid out in Hunter's *pro se* motion, we respectfully request that this Court grant Hunter's motion and reduce his sentence.

[14] *See United States v. Maumau*, No. 08-CR-00758-TC-11 (D. Utah May 11, 2020), ECF No. 1760 (reducing sentence to time served (10.5 years) despite three § 924(c) counts); *United States v. Young*, No. 2:00-CR-00002-1 (D. Tenn. May 1, 2020), ECF No. 109 (reduction to time served (about 20 years); five § 924(c) counts); *U.S.A. v. Defendants*, No. 2:99-CR-00257-CAS-3, 2020 WL 1864906, at *8 (C.D. Cal. Apr. 13, 2020) (reduction to time served (20 years, 3 months); four § 924(c) counts); *United States v. Clausen*, No. 00-291-2, 2020 WL 4601247, at *3 (E.D. Pa. Aug. 10, 2020) (reduction to time served (about 20 years); nine § 924(c) counts); *United States v. Curtis*, No. 01-CR-03-TCK, 2020 WL 6484185, at *9 (N.D. Okla. Nov. 4, 2020) (reduction to time served (about 20 years); eight § 924(c) counts); *McDonel*, No. 07-20189, 2021 WL 120935, at *6 (E.D. Mich. Jan. 13, 2021) (reduction to 20 years; five § 924(c) counts), *appeal filed*, No. 21-1152, – F. Supp. 3d –, 2021 WL 120935 (6th Cir. Feb. 16, 2021); *Ezell*, 2021 WL 510293, at *8 (reduction to time served (about 22 years); six § 924(c) counts); *Reid*, 2021 WL 837321, at *2, *8 (reduction to 21 years; five § 924(c) counts).

## Applicant Details

| | |
|---|---|
| First Name | **John** |
| Middle Initial | **J** |
| Last Name | **Martin** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **john.martin@columbia.edu** |
| Address | **Address**<br>Street<br>**550 2nd St., Apt. 1F**<br>City<br>**Hoboken**<br>State/Territory<br>**New Jersey**<br>Zip<br>**07030**<br>Country<br>**United States** |
| Contact Phone Number | **6102972392** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **New York University** |
| Date of BA/BS | **May 2016** |
| JD/LLB From | **Columbia University School of Law**<br>**http://www.law.columbia.edu** |
| Date of JD/LLB | **April 29, 2021** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Columbia Law Review** |
| Moot Court Experience | **Yes** |
| Moot Court Name(s) | **Harlan Fiske Stone Moot Court Competition** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **Yes** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Damrosch, Lori
damrosch@law.columbia.edu
212-854-3740
Barenberg, Mark
barenberg@law.columbia.edu
212-854-2260
Briffault, Richard
richard.briffault@law.columbia.edu
212-854-2638

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**JOHN MARTIN**
550 2nd St., Apt. 1F • Hoboken, NJ 07030 • (610) 297-2392 • john.martin@columbia.edu

The Honorable Eric N. Vitaliano
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

January 19, 2022

Dear Judge Vitaliano,

I am a legal fellow at the Brennan Center for Justice and a 2021 graduate of Columbia Law School. I write to apply for a clerkship in your chambers beginning in September 2023 or any later term thereafter.

I plan to work as a litigator in the coming years and hope to eventually pursue a career in law teaching. Accordingly, I see immense value in gaining practical experience within our federal court system and seek to do so by serving as a clerk. During my time at Columbia, I developed my research and writing skills by participating in a variety of legal internships and a judicial externship, working as a research and teaching assistant, and providing legal writing tutoring to first-year law students. Moreover, I served as an Articles Editor on the *Columbia Law Review* and authored multiple law review pieces. Presently, I continue to build upon my lawyering capabilities as I work on a range of litigation and legislative projects in my legal fellowship. I would appreciate the opportunity to apply these skills in a clerkship position.

Enclosed please find a resume, law school transcript, undergraduate transcript, and writing sample. Following separately are letters of recommendation from Professors Richard Briffault (212 854-2638, rb34@columbia.edu), Mark Barenberg (212 854-2260, barenberg@law.columbia.edu), and Lori Damrosch (212 854-3740, damrosch@law.columbia.edu). Thank you for your consideration. Please do not hesitate to contact me should you need any additional information.

Sincerely,

John Martin

# JOHN MARTIN

550 2nd St., Apt. 1F • Hoboken, NJ 07030 • (610) 297-2392 • john.martin@columbia.edu

## EDUCATION

**COLUMBIA LAW SCHOOL**, New York, NY
Juris Doctor, received April 2021

Honors: Harlan Fiske Stone Scholar
Hamilton Fellow (full-tuition merit scholarship)
Parker School Recognition of Achievement (for achievement in international and comparative law)

Activities: *Columbia Law Review*, Articles Editor
Teaching Assistant to Professor Richard Briffault (Law of the Political Process, Fall 2020)
Teaching Assistant to Professor Jane C. Ginsburg (Legal Methods I, Fall 2020)
Research Assistant to Professors Sarah Cleveland & Amal Clooney (2020) (researched global media freedom)
CLS Writing Center, Fellow (tutored 1L and LLM students in legal writing)
ACLU Student Chapter, President

**NEW YORK UNIVERSITY**, New York, NY
B.A., *magna cum laude*, in International Relations received May 2016; Minor in Economic Policy

Honors: Presidential Honors Scholar

Activities: *Economics Review at NYU*, Cofounder
Resident Assistant (2015–2016)

Study Abroad: NYU Abu Dhabi, United Arab Emirates (Spring 2014)

## EXPERIENCE

**BRENNAN CENTER FOR JUSTICE**, New York, NY — August 2021 – Present
*Legal Fellow*. Draft sections of briefs in multiple campaign finance cases, including an *amicus* brief filed in the ongoing U.S. Supreme Court case *FEC v. Cruz*. Regularly conduct research and write memoranda when needed on questions pertaining to the intersection of campaign finance and other areas of law. Evaluate and suggest changes to regulations being considered by the New York Public Campaign Finance Board. Draft federal legislative proposals to enhance the protection of state election officials.

**CAMPAIGN LEGAL CENTER**, Washington, DC — Spring 2021
*Legal Intern*. Conducted research and wrote memoranda on numerous campaign finance law questions. Contributed to research and formulation of legal arguments in federal litigation. Drafted testimony for legislative hearings in which CLC participated.

**WINSTON & STRAWN LLP**, New York, NY — Summer 2020
*Summer Associate*. Researched and summarized current no-poach antitrust jurisprudence to support litigation efforts. Wrote letters to the DOJ in a FOIA dispute. Led pro bono project to draft a document retention policy for a local nonprofit organization.

**HON. ROBERT D. SACK, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT**, New York, NY — Spring 2020
*Judicial Extern*. Drafted bench memoranda to prepare Judge Sack for oral arguments. Proofread summary orders to ensure that they adhered to the Bluebook and properly reflected the case law.

**KNIGHT FIRST AMENDMENT INSTITUTE**, New York, NY — Summer 2019
*Legal Intern*. Wrote memoranda overviewing First and Fifth Amendment issues that the Institute encountered in its constitutional challenge against prepublication review. Drafted portions of a district court brief. Determined which FOIA exemptions were worth disputing in a lawsuit against the DOJ. Participated in meetings to discuss future litigation opportunities and strategy.

**U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION**, Washington, DC — August 2016 – June 2018
*Paralegal*. Monitored prospective state and federal regulations that could result in anticompetitive harm to the U.S. economy, and worked with Division attorneys to communicate concerns to relevant legislators and departments. Analyzed documents received by parties within antitrust investigations to determine potential anticompetitive harm.

## PUBLICATIONS

*Mail-In Ballots and Constraints on Federal Power Under the Electors Clause*, 107 VA. L. REV. ONLINE 84 (2021).

Note, *Hacks Dangerous to Human Life*, 121 COLUM. L. REV. 119 (2021).

*Self-Funded Campaigns and the Current (Lack of?) Limits on Candidate Contributions to Political Parties*, 120 COLUM. L. REV. F. 178 (2020).

**INTERESTS**: French (conversational), Arabic (basic), weightlifting, drumming, skiing, urban exploration, cheesecake

Columbia Law School

**Registration Services**

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

05/20/2021 18:20:43

Program: Juris Doctor

John J Martin

**Spring 2021**

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L6670-1 | Columbia Law Review | | 0.0 | CR |
| L6231-2 | Corporations | McCrary, Justin | 4.0 | A |
| L6546-1 | Global Constitutionalism | Doyle, Michael W. | 3.0 | A |
| L6229-1 | Ideas of the First Amendment<br>[ Minor Writing Credit - Earned ] | Abrams, Floyd; Blasi, Vincent | 4.0 | A- |
| L8516-1 | S. Election Law for Civil Rights Lawyers | Perez, Myrna | 2.0 | B+ |
| L6683-1 | Supervised Research Paper | Briffault, Richard | 2.0 | A |

**Total Registered Points: 15.0**

**Total Earned Points: 15.0**

**Fall 2020**

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L6476-1 | Advanced Constitutional Law: Separation of Powers | Monaghan, Henry Paul | 3.0 | B+ |
| L6293-1 | Antitrust and Trade Regulation | McCrary, Justin | 3.0 | B+ |
| L6670-1 | Columbia Law Review | | 0.0 | CR |
| L6160-1 | Law in the Internet Society | Moglen, Eben | 2.0 | B+ |
| L6169-1 | Legislation and Regulation | Merrill, Thomas W. | 4.0 | B+ |
| L6680-1 | Moot Court Stone Honor Competition | Richman, Daniel; Strauss, Ilene | 0.0 | CR |
| L6274-2 | Professional Responsibility | Fox, Michael Louis | 2.0 | A |
| L6822-1 | Teaching Fellows | Ginsburg, Jane C. | 1.0 | CR |

**Total Registered Points: 15.0**

**Total Earned Points: 15.0**

**Spring 2020**

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L8518-1 | Advanced Research Practicum in Global Media Freedom | Cleveland, Sarah; Sokoler, Jennifer B.; Yeginsu, Can | 2.0 | CR |
| L6670-1 | Columbia Law Review | | 0.0 | CR |
| L6241-1 | Evidence | Capra, Daniel | 4.0 | CR |
| L6664-1 | Ex. Federal Appellate Court | Parker, Barrington; Sack, Robert D.; Sokoler, Jennifer B. | 1.0 | CR |
| L6664-2 | Ex. Federal Appellate Court - Fieldwork | Parker, Barrington; Sack, Robert D.; Sokoler, Jennifer B. | 3.0 | CR |
| L6473-1 | Labor Law | Barenberg, Mark | 4.0 | CR |
| L9383-1 | S. International Humanitarian Law | Rona, Gabor | 2.0 | CR |

**Total Registered Points: 16.0**

**Total Earned Points: 16.0**

**Fall 2019**

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L6670-1 | Columbia Law Review | | 0.0 | CR |
| L6238-1 | Criminal Adjudication | Richman, Daniel | 3.0 | B+ |
| L6425-1 | Federal Courts | Metzger, Gillian | 4.0 | A- |
| L6276-1 | Human Rights | Cleveland, Sarah; Clooney, Amal | 3.0 | A- |
| L6474-1 | Law of the Political Process | Greene, Jamal | 3.0 | A |
| L6675-1 | Major Writing Credit | Damrosch, Lori Fisler | 0.0 | CR |
| L6683-1 | Supervised Research Paper | Damrosch, Lori Fisler | 2.0 | A |

**Total Registered Points: 15.0**

**Total Earned Points: 15.0**

**Spring 2019**

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L6133-2 | Constitutional Law | Barenberg, Mark | 4.0 | B+ |
| L6108-2 | Criminal Law | Scott, Elizabeth | 3.0 | B |
| L6679-1 | Foundation Year Moot Court | Strauss, Ilene | 0.0 | CR |
| L6269-1 | International Law | Damrosch, Lori Fisler | 3.0 | A |
| L6121-1 | Legal Practice Workshop II | Smith, Trisha | 1.0 | HP |
| L6118-1 | Torts | Liebman, Benjamin L. | 4.0 | B |

**Total Registered Points: 15.0**

**Total Earned Points: 15.0**

**January 2019**

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L6130-1 | Legal Methods II: Methods of Persuasion | Genty, Philip M. | 1.0 | CR |

**Total Registered Points: 1.0**

**Total Earned Points: 1.0**

**Fall 2018**

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L6101-4 | Civil Procedure | Huang, Bert | 4.0 | A- |
| L6105-6 | Contracts | Mitts, Joshua | 4.0 | B+ |
| L6113-1 | Legal Methods | Ginsburg, Jane C. | 1.0 | CR |
| L6115-1 | Legal Practice Workshop I | Smith, Trisha; Whaley, Hunter | 2.0 | HP |
| L6116-1 | Property | Merrill, Thomas W. | 4.0 | B+ |

**Total Registered Points: 15.0**

**Total Earned Points: 15.0**

**Total Registered JD Program Points: 92.0**

**Total Earned JD Program Points: 92.0**

**Honors and Prizes**

| Academic Year | Honor / Prize | Award Class |
|---|---|---|
| 2020-21 | Parker School Recognition of Achievement | 3L |
| 2020-21 | Harlan Fiske Stone | 3L |
| 2019-20 | Harlan Fiske Stone | 2L |

**Pro Bono Work**

| Type | Hours |
|---|---|
| Mandatory | 40.0 |

**Name:** **John J Martin**
**Birthdate (MM/DD):** **12/21**
**Print Date:** **05/20/2021**
**Student ID:** **N15737970**
**Institution ID:** **002785**
**Page:** **1 of 2**

**New York University**
**Beginning of Undergraduate Record**

**Degrees Awarded**

Bachelor of Arts 05/18/2016
College of Arts and Science
Honors: magna cum laude
Cum GPA: 3.816
Major: International Relations with honors
Minor: Economics

**Test Credits**

**Test Credits Applied Toward Fall 2012**

| Test | Component | Units |
|---|---|---|
| ADV_PL | English Literature & Comp. | 4.0 |
| ADV_PL | European History | 4.0 |
| ADV_PL | Economics - Macroeconomics | 0.0 |
| ADV_PL | Economics - Microeconomics | 0.0 |
| ADV_PL | Psychology | 4.0 |
| ADV_PL | Statistics | 4.0 |
| ADV_PL | US History | 4.0 |
| | Test Totals: | 20.0 |

**Fall 2012**

College of Arts and Science
Bachelor of Arts
Major: Undecided

| | | | |
|---|---|---|---|
| Freshman Cohort Meeting | COHRT-UA 10-040 | 0.0 | P |
| Elem French Level II | FREN-UA 2-006 | 4.0 | A- |
| Natural Science I: Quarks to Cosmos | MAP-UA 209-001 | 4.0 | A |
| Cultures & Contexts: Middle Eastern Societies | MAP-UA 511-001 | 4.0 | A- |
| International Politics | POL-UA 700-001 | 4.0 | A |

| | AHRS | EHRS | QHRS | QPTS | GPA |
|---|---|---|---|---|---|
| Current | 16.0 | 16.0 | 16.0 | 61.600 | 3.850 |
| Cumulative | 16.0 | 36.0 | 16.0 | 61.600 | 3.850 |

**Spring 2013**

College of Arts and Science
Bachelor of Arts
Major: Undecided

| | | | |
|---|---|---|---|
| Economics Principles I (P) | ECON-UA 1-001 | 4.0 | A- |
| Writing The Essay: | EXPOS-UA 1-018 | 4.0 | A- |
| Intens Intermed French | FREN-UA 20-001 | 6.0 | A |
| Thinking Historically? Revisionism in Ireland, Britain, Germany, and Israel | FRSEM-UA 482-001 | 4.0 | A |

| | AHRS | EHRS | QHRS | QPTS | GPA |
|---|---|---|---|---|---|
| Current | 18.0 | 18.0 | 18.0 | 69.600 | 3.867 |
| Cumulative | 34.0 | 54.0 | 34.0 | 131.200 | 3.859 |

Term Honor: Dean`s List for Academic Year

**Fall 2013**

College of Arts and Science
Bachelor of Arts
Major: Politics

| | | | |
|---|---|---|---|
| Introduction to Microeconomics | ECON-UA 2-020 | 4.0 | A |
| Natural Science II: Human Genetics | MAP-UA 303-001 | 4.0 | A |
| Elementary Arabic I | MEIS-UA 101-003 | 4.0 | A |
| International Law | POL-UA 740-001 | 4.0 | B+ |
| Sophomore Scholars Seminar | SCHOL-UA 20-004 | 0.0 | P |
| Leadership/Ps/Res Colleg | UPADM-GP 1-002 | 0.0 | P |

| | AHRS | EHRS | QHRS | QPTS | GPA |
|---|---|---|---|---|---|
| Current | 16.0 | 16.0 | 16.0 | 61.200 | 3.825 |
| Cumulative | 50.0 | 70.0 | 50.0 | 192.400 | 3.848 |

**Spring 2014**

College of Arts and Science
Bachelor of Arts
Major: Politics
NYU Abu Dhabi

| | | | |
|---|---|---|---|
| Elementary Arabic 2 | ARABL-AD 102-002 | 4.0 | A |
| Economic History of the Middle East | ECON-AD 214X-001 | 4.0 | A- |
| Public Policy Challenges in the Middle East | POLSC-AD 159X-001 | 4.0 | A |
| International Political Economy | POLSC-AD 173-001 | 4.0 | A |
| Sophomore Scholars Seminar | SCHOL-UA 20-004 | 0.0 | P |

| | AHRS | EHRS | QHRS | QPTS | GPA |
|---|---|---|---|---|---|
| Current | 16.0 | 16.0 | 16.0 | 62.800 | 3.925 |
| Cumulative | 66.0 | 86.0 | 66.0 | 255.200 | 3.867 |

Term Honor: Dean`s List for Academic Year

**Fall 2014**

College of Arts and Science
Bachelor of Arts
Major: Politics
Minor: Economics

| | | | |
|---|---|---|---|
| Texts & Ideas: Antiquity & The 19th Century | CORE-UA 404-001 | 4.0 | A- |
| Conversation and Composition | FREN-UA 30-003 | 4.0 | A |
| Mathematics for Economics I | MATH-UA 211-013 | 4.0 | P |
| Intermediate Arabic I | MEIS-UA 103-001 | 4.0 | B+ |
| Junior Scholars Seminar | SCHOL-UA 30-001 | 0.0 | P |
| Leadership/Ps/Res Colleg | UPADM-GP 1-001 | 0.0 | P |

| | AHRS | EHRS | QHRS | QPTS | GPA |
|---|---|---|---|---|---|
| Current | 16.0 | 16.0 | 12.0 | 44.000 | 3.667 |
| Cumulative | 82.0 | 102.0 | 78.0 | 299.200 | 3.836 |

**Spring 2015**

College of Arts and Science
Bachelor of Arts
Major: International Relations
Minor: Economics

| | | | |
|---|---|---|---|
| Statistics (P) | ECON-UA 18-001 | 4.0 | A- |
| Spoken Contemp French I | FREN-UA 101-002 | 4.0 | A |
| Intermediate Arabic II | MEIS-UA 104-003 | 4.0 | A |
| U.S. Foreign Policy | POL-UA 710-001 | 4.0 | B+ |
| Junior Scholars Seminar | SCHOL-UA 30-001 | 0.0 | P |
| Leadership and Public Service: Residential College Goddard II | UPADM-GP 2-001 | 0.0 | P |

| | AHRS | EHRS | QHRS | QPTS | GPA |
|---|---|---|---|---|---|
| Current | 16.0 | 16.0 | 16.0 | 60.000 | 3.750 |
| Cumulative | 98.0 | 118.0 | 94.0 | 359.200 | 3.821 |

Term Honor: Dean`s List for Academic Year

**Fall 2015**

College of Arts and Science

**Name:** **John J Martin**
**Birthdate (MM/DD):** **12/21**
**Print Date:** **05/20/2021**
**Student ID:** **N15737970**
**Institution ID:** **002785**
**Page:** **2 of 2**

Bachelor of Arts
Major: International Relations
Minor: Economics

| | | | |
|---|---|---|---|
| International Economics (P) | ECON-UA 238-001 | 4.0 | A- |
| Intro to Econometrics | ECON-UA 266-004 | 4.0 | A- |
| Ir Senior Seminar | INTRL-UA 990-002 | 4.0 | B |
| Topics: Democracy, Dictatorship and Globlization | POL-UA 994-001 | 4.0 | A |
| Seniors Scholars Seminar | SCHOL-UA 40-001 | 0.0 | P |

| | AHRS | EHRS | QHRS | QPTS | GPA |
|---|---|---|---|---|---|
| Current | 16.0 | 16.0 | 16.0 | 57.600 | 3.600 |
| Cumulative | 114.0 | 134.0 | 110.0 | 416.800 | 3.789 |

**January 2016**

College of Arts and Science
Bachelor of Arts
Major: International Relations
Minor: Economics
AD in Washington DC

| | | | |
|---|---|---|---|
| Islamic Extremism | POLSC-AD 186JX -001 | 4.0 | A |

| | AHRS | EHRS | QHRS | QPTS | GPA |
|---|---|---|---|---|---|
| Current | 4.0 | 4.0 | 4.0 | 16.000 | 4.000 |
| Cumulative | 118.0 | 138.0 | 114.0 | 432.800 | 3.796 |



**Spring 2016**

College of Arts and Science
Bachelor of Arts
Major: International Relations
Minor: Economics

| | | | |
|---|---|---|---|
| Expressive Culture: Film | CORE-UA 750-001 | 4.0 | A |
| Ethics and Economics | ECON-UA 207-001 | 4.0 | A |
| Ir Senior Honors | INTRL-UA 991-002 | 4.0 | A |
| Seniors Scholars Seminar | SCHOL-UA 40-001 | 0.0 | P |

| | AHRS | EHRS | QHRS | QPTS | GPA |
|---|---|---|---|---|---|
| Current | 12.0 | 12.0 | 12.0 | 48.000 | 4.000 |
| Cumulative | 130.0 | 150.0 | 126.0 | 480.800 | 3.816 |

Term Honor: Dean`s List for Academic Year

**End of Undergraduate Record**

January 19, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I am delighted to recommend my former student John Martin, a member of the Columbia Law School JD class of 2021, for a clerkship in your chambers. He is highly qualified for any top clerkship in the country and I support him enthusiastically.

In John's three years at Columbia, I came to know him in multiple capacities; and in each context, he impressed me with all the qualities for success in any legal position, including a clerkship. Soon after he arrived at Columbia Law School in the fall of 2018, I was asked to become his faculty sponsor under the Hamilton Fellowship program, which offers a small number of incoming students a full-tuition merit-based scholarship and places them with a faculty member for ongoing mentorship. Because of John's interests in my own field of international law, I eagerly undertook to mentor him as a Hamilton Fellow and was very pleased that his curricular choices related to international law gave me the opportunity to work with him in the classroom and in the preparation of a supervised research paper.

In the spring semester of his first year of law school (spring 2019), John took my International Law course as an approved 1-L elective. Over most of my teaching career at Columbia, this course has been offered only to upper-division law students and advanced graduate students; only recently did the administration allow 1-Ls to enroll in International Law in their second semester. The course that John took was a medium-sized class of about 40 students, in which it was possible to get to know all the students personally and appreciate their different strengths. There were three bases of evaluation: (1) blind-graded examination, accounting for approximately half the grade; (2) class participation throughout the semester, and (3) a short research exercise on a topic involving international treaties. John excelled on all measures of evaluation and received the grade of "A" for the course – one of only a few such high grades awarded that semester. This performance is all the more impressive given that most students in the class were further along in their legal studies (including some with previous study of and experience in international law).

After completion of his 1-L year, John was accepted onto the Columbia Law Review; and in that capacity, he asked me to supervise his preparation of a draft note and also to work with him as supervisor of his major writing project. In light of his outstanding performance in my International Law class and the fact that his intended topic would be in the area of foreign sovereign immunity, I was happy to undertake these supervisory responsibilities. In fall 2019, he framed and refined the issue for the note, focusing on possible avenues for suing foreign states in U.S. courts for attacks on the cybersecurity of foreign dissidents located in the United States. The topic entails close examination of the Foreign Sovereign Immunities Act as recently amended by the Justice Against Sponsors of Terrorism Act, with a view to determining whether the ordinary presumption of foreign sovereign immunity could be overcome in the case of cyber intrusions jeopardizing the privacy, security, and perhaps even the life of a target of such an attack. The result is an excellent paper, which was published by the Columbia Law Review in January of 2021, with the title "Hacks Dangerous to Human Life." Based on its high quality, I awarded it the grade of "A" for two points of academic credit in fall 2019 and also certified it in fulfillment of the JD major writing requirement.

The note deals with the availability of legal remedies against governments that interfere with freedom of expression of dissidents by hacking their communications. It shows John's capabilities for researching and analyzing cutting-edge legal issues and presenting original insights in a well-written and persuasive way. Significantly, the note has already been cited in at least one petition for certiorari to the U.S. Supreme Court, in a case seeking to pierce the sovereign immunity of a foreign state allegedly involved in a cyberattack on U.S. citizens.

John earned academic honors at the Harlan Fiske Stone Scholar level twice and received recognition at graduation from Columbia's Parker School for his achievements in international and comparative law. He continued to deepen his knowledge of the protection of free expression in international and U.S. law through his course of study in his second and third years of law school. He likewise remained engaged in research and writing through his work as an articles editor of the Law Review and other co-curricular and extracurricular activities, with continued success in preparing and placing legal articles for publication.

John is well-equipped for a clerkship by virtue of his experience as an extern with the U.S. Court of Appeals for the Second Circuit during his second year of law school and his fellowship after graduation with the Brennan Center for Justice in its Election Reform Program. He is deeply committed to a public interest career.

He is superbly qualified for a clerkship and I commend him to you with great enthusiasm.

Sincerely yours,

Lori Fisler Damrosch

Lori Damrosch - damrosch@law.columbia.edu - 212-854-3740

Lori Damrosch - damrosch@law.columbia.edu - 212-854-3740

January 19, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

**Recommendation of John J. Martin for Clerkship**

I'm delighted to give my highest possible recommendation of John Martin for your clerkship. I have no doubt he'll make a great clerk. He has all the intellectual and personal qualities that count for the job. I encourage you to snap him up.

Mr. Martin served as the Articles Editor of the *Columbia Law Review* and was awarded Harlan Fiske Stone honors on the basis of grades alone.

I had the pleasure of seeing his intellectual power in action: as a student in my Constitutional Law course in Spring 2019 and Labor Law course in Spring 2020, as my research assistant in Spring 2020, and again as my research assistant on a different project in Fall 2020-Spring 2021.

He excelled in all four contexts. In my Constitutional Law and Labor Law courses, Mr. Mar-tin's interjections were always constructive and smart, moving the discussion forward, raising intriguing original points, and building graciously on what other students and I had said. His exams were systematic, well crafted, and analytically sharp.

Mr. Martin came to my office hours frequently (in person and, later, via zoom) and I always looked forward to our long conversations. He's intellectually curious, concerned about the ana-lytics of the cases and, equally, the implications of the law for ordinary people's lives, for the rule of law, and for justice.

It was as my research assistant that I got to know Mr. Martin particularly well. In spring 2020, when the plague descended, he volunteered to assist me on a project investigating the free speech rights of government workers whose employers punished them for protesting about on-the-job exposure to the virus, and about the exposure of customers, patients, and the communi-ty. The law in this area is about as contorted as it gets. His research was terrific—thoroughly researched, lucidly explained, and reliable. I emphasize "reliable," because, frankly, I find that as good as my Columbia research assistants are, I typically have to follow up with pretty time-consuming re-plowing of the field, to check for comprehensiveness and accuracy. With Mr. Martin, I became confident that I did not need to re-till in that way, even in such a difficult area. That was wonderful. For that reason, I was happy when he volunteered to assist with another project in fall 2020 and again in spring 2021. We were designing legislation and institutions to incorporate channels for worker voice in a major sector of the economy in its reconstruction during and after the pandemic—an even more complex clump of research. Again, his work was energetic, agile, smart, and reliable. (I wish I could give more details about his role, but for rea-sons of attorney-client privilege, I can't.)

Working with Mr. Martin was also a pleasure in personal terms. He's a mild-mannered, wry, and cheerful collaborator. He takes supervision well, he's responsive, and he's proactive in sug-gesting new directions in substance and in source material. He's self-motivated, and knows when to come for supervision and direction.

It was a pleasure to have several lengthy one-on-one zoom conversations with him about fami-ly, politics, and life. He stayed cheerful during the pandemic, even though his parents are in a tough stretch. John's working-class background is at the core of his identity and his concern for the impact of the law on the people it affects.

So, again, I give Mr. Martin my highest possible recommendation. As I said at the top, he has all the qualities that count for being a top-notch clerk and a great asset to your chambers. You can't go wrong with him.

Sincerely,

Professor Mark Barenberg
Isador and Seville Sulzbacher Professor of Law
Columbia Law School
New York City

Mark Barenberg - barenberg@law.columbia.edu - 212-854-2260

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

January 19, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

**Re: John Martin**

Dear Judge Vitaliano:

I am writing on behalf of John Martin of the Columbia Law School Class of 2021, who is applying to you for a clerkship. John has a strong Law School record. He is very smart, focused, hard-working, a thorough researcher, and a clear and careful writer. He will make an excellent law clerk.

I know John primarily from his work for me as a teaching assistant for my course on the Law of the Political Process in the Fall 2020 term, and from supervising his independent re-search project on the evolving law of campaign contribution restrictions. As a TA, John was consistently prepared, well-organized and professional. Being a TA during that COVID-19 semester was a particular challenge, as the course was being taught "hybrid." I was in the classroom, masked, with about eighteen students, and the other forty-four were simultaneously on Zoom. John's role was essential in managing the combination of in-class and Zoom technology, fielding student questions, and running breakouts and polls. He also conducted Zoom office hours for students. He did this all professionally, patiently, and seamlessly, and his work was essential to the course's success.

John is intellectually curious, and has excellent research, writing, and analytical skills. His short piece in the Virginia Online Law Review on Mail-in Ballots and the Elections Clause came out of an original idea of his and some probing questions he asked me after a session of the Political Process class in which he was a teaching assistant. His supervised research paper on campaign contribution limits pulled together history, a close examination of legal doctrine, and careful study of current campaign finance practices. His writing was particularly nuanced in parsing standards of review and the elements of a multi-part test articulated in a Supreme Court case. He is a very careful reader of cases and a point he raised in the paper got me to see a recent Supreme Court decision in an entirely new light. Although plainly interested in the political and law reform context of election law and especially campaign finance law, John consistently approaches these issues as a lawyer's lawyer – mastering the cases and doctrine, teasing out the implications, and focusing and on the unresolved and unanswered questions.

John had an excellent record at Columbia. He was honored as a Harlan Fiske Stone Scholar in both his second and third years of Law School, which surely puts him in the top quarter of his class. He also received a certificate of achievement from the Parker School, which testifies to his interest in international law. In addition to his strong performance in the classroom, John was an Articles Editor of the Columbia Law Review, which reflects his fellow editors' recognition of his organizational skills and dedication. He was also a teaching assis-tant or research assistant to three of my colleagues, again demonstrating his research, writing, and analytical strengths across a wide range of subjects. John has also had significant practice experience as a legal intern at the Campaign Legal Center, and, starting this year, at the Brennan Center for Justice.

John has a sharp, probing mind, a strong work ethic, and excellent research and writing skills. He has a low-key, modest personality, with a good sense of humor. He is very easy to work with, and eager to be helpful. Based on his academic record, his analytical ability, and his personal qualities, I am sure he will make an excellent law clerk. Please call me at 212-854-2638 if I can be of any further assistance to you in assessing John Martin's application.
Sincerely,

Richard Briffault
Joseph P. Chamberlain Professor of Legislation

Richard Briffault - richard.briffault@law.columbia.edu - 212-854-2638

**JOHN MARTIN**
550 2nd St., Apt. 1F • Hoboken, NJ 07030 • (610) 297-2392 • john.martin@columbia.edu

## Writing Sample — Memo

This writing sample is a memorandum I wrote in my current position as a legal fellow at the Brennan Center for Justice. In recent years, "scam PACs"—bogus groups masquerading as legitimate political action committees—have become a notable problem during federal elections, causing many state regulators to seek to crack down on such scam PACs through the application of state law (e.g., antifraud statutes). Accordingly, some state regulators communicated with the Brennan Center for guidance, raising a few questions about the potential repercussions of pursuing civil or criminal enforcement against scam PACs. This memorandum answers some of those questions, namely the extent to which the First Amendment protects the actions of scam PACs and whether the Federal Election Campaign Act (FECA) preempts the enforcement of state law against federal scam PACs. No one edited this memorandum other than myself.

**To**: [name removed upon request]
**From**: John Martin
**Re**: Federal Scam PACs, the First Amendment & Federal Preemption
**Date**: September 8, 2021

**Questions Presented**

1. What level of First Amendment protection is afforded to false and/or misleading speech?
    a. Is false political speech more or less protected than false commercial speech?
    b. What level of falsehood is required for speech to lose its protection?

2. To what extent are state regulators who are cracking down on federal scam PACs likely able to argue that their efforts to enforce state law are not preempted by FECA?

**Short Answers**

1. The level of First Amendment protection afforded to false/misleading speech depends greatly on the context of a given case. While the Supreme Court has maintained the importance of protecting some false speech, such as false speech that pertains to public issues, the Court has also held as constitutional prohibitions on other types of false speech, including fraud, perjury, and false commercial speech. As for a modern approach to content-based restrictions on false speech, Justice Kennedy's and Justice Breyer's respective plurality opinion and concurrence in *United States v. Alvarez* provide some guidance, namely that such restrictions must be narrowly tailored and target a specific harm to survive First Amendment scrutiny.

   False political speech is more protected than false commercial speech. Federal courts have struck down many laws prohibiting false political speech, indicating that only the most narrowly tailored of such laws could survive. Meanwhile, the Court's *Central Hudson* test explicitly states that false commercial speech has virtually zero protection under the First Amendment. For false commercial speech to be "false" enough to lose its First Amendment protection, however, it cannot be mere puffery or opinion, nor can it be subject to multiple interpretations by the consumer. Rather, truly "false" commercial speech must be unambiguous and present a real danger of misleading consumers.

2. The question of whether FECA preempts the enforcement of state law against federal scam PACs has gone unanswered by the Supreme Court. Nevertheless, federal circuit and district court opinions on FECA and preemption offer some guidance on the extent to which FECA may preempt such enforcement of state law. Express preemption likely provides the greatest hurdle because FECA has an express preemption clause. Nevertheless, courts have read FECA's preemption clause fairly narrowly, permitting states to subject federal political committees to a variety of state laws that have nothing to do specifically with federal elections. Meanwhile, neither field nor obstacle preemption seem too applicable, provided that states are enforcing laws of general applicability against federal scam PACs.

**Discussion**

First Amendment Protection of False/Misleading Speech

Whether false speech is protected under the First Amendment is a complicated question that depends on a variety of factors. In general, though, false political speech tends to receive strong First Amendment protection whereas false commercial speech receives virtually none. For commercial speech to be deemed false, however, such speech cannot be mere opinion or puffery; instead, to lose its First Amendment protection, commercial speech must be unambiguously false and present an actual danger of misleading consumers.

*Level of First Amendment Protection*

The level of First Amendment protection provided to false speech is highly context specific. As Professor Erwin Chemerinsky explains, "There is no consistent answer as to whether false speech is protected by the First Amendment."[1] Rather, the Supreme Court has approached its analyses of cases involving the regulation of false speech by balancing competing interests, thus arriving at different conclusions depending on the facts of the particular case.[2] Accordingly, while the Court has said that "demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements,"[3] the Court still affords First Amendment protection to at least some false speech.

The Court has especially maintained the importance of protecting false speech in cases in which the speech in question pertained to public issues. In *New York Times Co. v. Sullivan*,[4] for example, the Court struck down a libel suit filed by an elected Montgomery official against the New York Times for publishing an advertisement critical of the manner in which Montgomery police had treated civil rights demonstrators, despite the advertisement containing indisputably false statements.[5] In doing so, the Court invoked the First Amendment, emphasizing "the principle that debate on public issues should be uninhibited, robust, and wide-open."[6] More importantly, the Court explicitly stated that "erroneous statement[s] [are] inevitable in free debate," and that "[they] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need

[1] Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1, 5 (2018) ("[T]he Court never will be able to say that all false speech is outside of First Amendment protection or that all false speech is constitutionally safeguarded.").
[2] *See id.*
[3] Brown v. Hartlage, 456 U.S. 45, 60 (1982).
[4] 376 U.S. 254 (1964).
[5] *See id.* at 292. The advertisement's false statements included the following: (1) It said that Martin Luther King Jr. had been arrested seven times, when in reality he had only been arrested four times; (2) It said that nine students had been expelled for the demonstration, while their suspension had been for a different protest; and (3) It erroneously said that a dining hall had been padlocked. *Id.* at 258–59.
[6] *Id.* at 270.

to survive.'"[7] Consequently, *New York Times v. Sullivan* ultimately established that at least some false speech is protected under the First Amendment.[8]

More recently, the Court has suggested that the constitutionality of content-based restrictions on false speech turns on the nature of the harm and whether alternative remedial measures exist. In *United States v. Alvarez*,[9] for example, the Court struck down a provision of the Stolen Valor Act that criminalized lying about having a military medal.[10] The Court, nevertheless, was split over which level of scrutiny to apply. Writing for the plurality, Justice Kennedy applied "exacting scrutiny," requiring the government to demonstrate that the restriction on false speech achieves a compelling interest in the least restrictive means possible.[11] Under this standard, Justice Kennedy found the provision to be overinclusive because, "by its plain terms[,] [it] applies to a false statement made at any time, in any place, to any person."[12] Moreover, Justice Kennedy found the restriction unnecessary for the government to achieve its interest in preserving the integrity of the military honors system, for two reasons. First, the government did not provide any evidence that "the public's general perception of military awards is diluted by false claims [such as stolen valor.]"[13] Second, the government did not show "why counterspeech would not suffice to achieve its interest."[14] Thus, the Stolen Valor Act provision did not survive Justice Kennedy's exacting scrutiny approach, nor likely would most content-based restrictions on false speech.

Writing his own concurrence in *Alvarez*, Justice Breyer noted that "[the] Court has frequently said or implied that false factual statements enjoy little First Amendment protection."[15] Justice Breyer, nevertheless, asserted that "these judicial statements cannot be read to mean 'no protection at all'" because "[f]alse factual statements can serve useful human objectives."[16] Accordingly, Justice Breyer advocated for an intermediate standard of review, which he called "proportionality review."[17] Under this standard, the Court would "determine whether the statute works speech-related harm that is out of proportion to its justifications."[18] Applying

[7] *Id.* at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).
[8] The Court's actual holding is much narrower, namely that public officials bringing defamation cases over a false statement must prove that the defendant said such statement with "actual malice." *Sullivan*, 376 U.S. at 279–80. The case's protection of false speech, however, is one of its greatest legacies. *See* Chemerinsky, *supra* note 1, at 7.
[9] 567 U.S. 709 (2012).
[10] *Id.* at 729–30 (plurality opinion). The struck-down provision stated that "[w]hoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both." 18 U.S.C. § 704(b) (2012).
[11] *See Alvarez*, 567 U.S. at 715 (plurality opinion).
[12] *Id.* at 722–23.
[13] *Id.* at 726.
[14] *Id.* at 726–27 ("The remedy for speech that is false is speech that is true.").
[15] *Id.* at 732–33 (Breyer, J., concurring in the judgment). Justice Kagan joined Justice Breyer's concurrence.
[16] *Id.* at 733. Examples that Justice Breyer provided include protecting privacy, preventing embarrassment, and preserving a child's innocence. *See id.*
[17] *Id.* at 730–31.
[18] *Id.* at 730. This would include accounting for factors such as (1) "the seriousness of the speech-related harm the provision will likely cause"; (2) "the nature and importance of the provision's countervailing objectives"; (3) "the extent to which the provision will tend to achieve those objectives"; and (4) "whether there are other, less restrictive ways of doing so." *Id.*

proportionality review, Justice Breyer found the provision in question unconstitutional because it "lack[ed] any . . . limiting features."[19] Justice Breyer did, however, state that the provision could be constitutional if it were "more finely tailored," such as having the level of prestige of the medal that a defendant claims to own correspond with the level of punishment they would receive for their lie.[20] Overall, Justice Breyer would apply less, albeit some, First Amendment protection to false speech than would Justice Kennedy—it remains unclear which approach today's Court would take. At the very least, *Alvarez* demonstrates that the Court would likely strike down a content-based restriction on false speech on First Amendment grounds if the restriction were not the least restrictive means of preventing some specific harm.[21]

The First Amendment certainly does not protect all false speech, though. It is a finable offense, for instance, to willfully provide false answers to questions for the U.S. Census.[22] Moreover, perjury before a grand jury or court is a felony offense under federal law,[23] which the Court has described as having "unquestioned constitutionality."[24] Perhaps most notably, the Court has clearly established "that false and deceptive advertisements are unprotected by the First Amendment,"[25] a principle that is discussed in detail in the next section. Why does false speech in these examples lack First Amendment protection? While not absolutely clear, the plurality opinion and concurrence in *Alvarez* provide some guidance. According to Justice Kennedy, there is a distinction between restrictions targeting "legally cognizable harm[s]"and restrictions targeting "falsity and nothing more," with constitutional restrictions on false speech falling in the former category.[26] Similarly, Justice Breyer finds that restrictions on false speech can be constitutional when they "limit[] the prohibited lies to those that are particularly likely to produce harm."[27]

To summarize, whether false speech is protected under the First Amendment greatly depends on context, and the Court's approach is not always consistent. The restriction, however, must likely be narrowly tailored and target some specific harm to pass constitutional muster.

*Political Speech vs. Commercial Speech*

False political speech generally seems to enjoy greater First Amendment protection than false commercial speech. The Court has identified political speech as being at "the essence of First Amendment expression"—comparable to how the Court described speech on public issues in *New York Times v. Sullivan*[28]—therefore entitling such speech to "great[] constitutional protection."[29]

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[19] *Id.* at 736.
[20] *See id.* at 737–38.
[21] As Justice Kennedy states, "[F]alsity alone may not suffice to bring . . . speech outside the First Amendment." *Id.* at 719 (plurality opinion).
[22] *See* 13 U.S.C. § 221(b) (2018).
[23] *See* 18 U.S.C. § 1623(a) (2018) (stating that anyone who commits perjury under oath "shall be fined . . . or imprisoned not more than five years, or both").
[24] United States v. Grayson, 438 U.S. 41, 54 (1978).
[25] Chemerinsky, *supra* note 1, at 9; *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980).
[26] *See Alvarez*, 567 U.S. at 719 (plurality opinion).
[27] *See id.* at 734 (Breyer, J., concurring in the judgment).
[28] *See supra notes* 4–8 and accompanying text.
[29] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

Even when laws specifically target false political speech, courts seem reluctant to find such laws constitutional under the First Amendment.

The case of *Susan B. Anthony List v. Driehaus* provides a recent example of this, in which the Sixth Circuit struck down an Ohioan law that prohibited persons from disseminating false information about a political candidate "knowing the same to be false or with reckless disregard of whether it was false or not."[30] The case first made its way up to the Supreme Court in 2014, during which the Court remanded the case back to the Sixth Circuit over standing issues without deciding any issue on the merits.[31] Nevertheless, writing for a unanimous Court, Justice Thomas did state that "[t]he burdens that [the law] can impose on electoral speech are of particular concern here."[32] This suggests that the Court is at least wary of restrictions on false political speech.

On remand, the Sixth Circuit expressed similar concerns. First, the court determined that strict scrutiny was the appropriate standard of review to apply to the Ohioan law.[33] While the court acknowledged that false speech receives only "some constitutional protection," the court took issue with the fact that the law applied to "*all* false speech regarding a political candidate, even that which may not be material, negative, defamatory, or libelous."[34] Thus, because of the law's broad scope, strict scrutiny applied. Next, the court found compelling Ohio's interests in preserving election integrity, protecting voters from confusion and undue influence, and ensuring that fraud does not undermine the right to vote.[35] The court, however, did not find the law to be narrowly tailored, citing six reasons: (1) criminal proceedings were not guaranteed to conclude before relevant elections; (2) the hearing process failed to screen out frivolous complaints; (3) the law applied to all false statements, including non-material ones (e.g., lying about a candidate's shoe size); (4) the law applied to advertisers; (5) the law's overinclusivity could damage campaigns and therefore election integrity; and (6) the law too closely resembled another law struck down by the Supreme Court in *McIntyre*.[36] Overall, *Susan B. Anthony List* demonstrates how the First Amendment would likely provide protection against future restrictions on false political speech, despite many compelling interests, unless such a restriction were extraordinarily narrowly tailored.

Compare this with false commercial speech, which enjoys far less protection under the First Amendment. The most authoritative case on commercial speech is *Central Hudson*, in which an electric company sued the Public Service Commission of New York for requiring electric

[30] 814 F.3d 466, 469–70, 476 (6th Cir. 2016) (internal quotation marks omitted). This law only applied "if the statement [was] designed to promote the election, nomination, or defeat of the candidate." *Id.*
[31] *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 168 (2014).
[32] *Id.* at 165. Professor Chemerinsky responded to this opinion by stating that "[i]t is hard to imagine the Supreme Court upholding a state law like Ohio's that prohibits false statements in election campaigns." Chemerinsky, *supra* note 1, at 8.
[33] *See Susan B. Anthony List*, 814 F.3d at 472–73.
[34] *Id.*
[35] *See id.* at 473–74.
[36] *See id.* at 474–76. In *McIntyre*, the Court struck down Ohio's election law prohibiting anonymous leafleting "because its prohibitions included non-material statements that were 'not even arguably false or misleading,' made by candidates, campaign supporters, and 'individuals acting independently and using only their own modest resources,' whether made 'on the eve of an election, when the opportunity for reply is limited,' or months in advance." *Id.* at 476 (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 351–52 (1995)).

companies to ban any language in their marketing that promoted the use of electricity.[37] While the Court ultimately struck down the Commission's broad prohibition,[38] the Court did so by utilizing what is now known as the "*Central Hudson* test"—a test that essentially precludes false commercial speech from First Amendment protection. The *Central Hudson* test begins with a threshold question: Is the regulated commercial speech "misleading" or concerning unlawful activity? If the answer is yes to either, then the First Amendment offers no protection to the commercial speech in question, and the case is settled.[39] Consequently, false commercial speech is not a protected form of speech under the U.S. Constitution. In the Court's words, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public."[40]

Overall, the First Amendment affords strong protection to false political speech, but little protection to false commercial speech. As the next section discusses, though, what constitutes false commercial speech is subject to some debate.

*Level of Falsehood Required Under* Central Hudson

For commercial speech to qualify as "false"—and thus lose its First Amendment protection—its falsity must be fairly clear and likely to mislead others. As one expert puts it, "To be characterized as literally false, a statement must be unambiguous. An advertising claim [that is] reasonably susceptible to multiple interpretations [will not] meet that high standard."[41] The case law largely reflects this assertion.

For instance, the Ninth Circuit recently maintained in a false advertising lawsuit brought under Section 43(a) of the Lanham Act[42] that "[s]tatements of opinion and puffery . . . are not actionable."[43] Likewise, in partially dismissing a Section 43(a) action against Blue Cross/Blue Shield for advertisements that said "Better than HMO. So good, it's Blue Cross and Blue Shield," the Third Circuit stated that "[t]his strikes us as the most innocuous kind of 'puffing,' common to advertising and presenting *no danger of misleading the consuming public*."[44] Finally, in the 2010

[37] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 558–59 (1980). The Commission passed this rule during the 1973 oil crisis. *See id.*
[38] *Id.* at 572.
[39] If the commercial speech in question is not misleading and concerns lawful activity, then courts apply a three-pronged test: (1) Does the government have a substantial interest? (2) Does the regulation directly and materially advance such interest? (3) Is the regulation narrowly tailored? If the answer to all three questions is yes, then the regulation is constitutional. Thus, the *Central Hudson* test subjects truthful, lawful commercial speech to a form of intermediate scrutiny. *See id.* at 564–66; *see also* David L. Hudson, Jr., *Central Hudson Test*, FIRST AMENDMENT ENCYCLOPEDIA (2017), https://www.mtsu.edu/first-amendment/article/1536/central-hudson-test.
[40] *Cent. Hudson*, 447 U.S. at 563.
[41] Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 108 (2020).
[42] Section 43(a) of the Lanham Act makes false advertising an actionable offense. Specifically, Section 43(a) makes it an actionable offense for persons to engage in commercial speech that (1) "is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person," or (2) "misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." 15 U.S.C. § 1125 (2018).
[43] Ariix, LLC v. Nutrisearch Corp., 985 F.3d 1107, 1121 (9th Cir. 2021).
[44] U.S. Healthcare v. Blue Cross of Greater Phila., 898 F.2d 914, 926 (3d Cir. 1990) (emphasis added).

case of *Alexander v. Cahill*, the Second Circuit held that a New York rule prohibiting the use of "a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter" in attorney advertisements did not survive the *Central Hudson* test, and therefore violated the First Amendment.[45] In striking down the rule, the court explained that "[t]here is a dearth of evidence . . . supporting the need for [a] prohibition on names that imply an ability to get results when the names are akin to, and no more than, the kind of puffery that is commonly seen, *and indeed expected*, in commercial advertisements generally."[46] The court noted in particular that there was no evidence of consumers having been in fact misled by "the sorts of names and promotional devices" targeted by the rule,[47] thus highlighting how consumer expectations and reactions can play a role in First Amendment analyses of prohibitions on false commercial speech.

Compare the above cases to the Eleventh Circuit fraud case of *United States v. Sarcona*, in which the defendant's First Amendment "puffery" defense failed.[48] In *Sarcona*, a jury charged the defendant, the founder of a weight-loss company, with fraud for engaging in deceptive practices.[49] Such practices included advertising scientifically unsupported claims about achieving dramatic weight loss within brief periods of time without dieting or exercise, as well as false representations of medical endorsements.[50] On appeal, the defendant raised a First Amendment defense, claiming that his exaggerations in his advertisements were "mere puffery" and that he had "a First Amendment right to advertise his product aggressively."[51] The Eleventh Circuit rejected this defense, finding that there was sufficient evidence that the defendant "*intentionally* presented *materially* false and misleading information" about his company and its product's weight-loss benefits.[52] According to the court, the defendant's advertising "went far beyond mere puffery" and crossed the line "into the realm of fraud and deception," thus precluding him from claiming protection under the First Amendment.[53]

In short, commercial speech does not qualify as false or misleading for *Central Hudson*/First Amendment purposes if it is puffery or opinion, or if it could be subject to multiple interpretations by the consumer. Instead, to lose its First Amendment protection, such speech must relay an unequivocal message containing materially false information that presents an actual danger of misleading consumers.

[45] 598 F.3d 79, 94–95 (2d Cir. 2010).
[46] *Id.* at 95 (emphasis added).
[47] *See id.*
[48] 457 F. App'x 806, 816 (11th Cir. 2012).
[49] *Id.* at 808.
[50] *Id.*
[51] *Id.* at 814–15.
[52] *Id.* at 815 (emphases added).
[53] *Id.*

FECA Preemption of State Regulation of Federal Scam PACs

The question of whether FECA preempts the enforcement of state law against federal scam PACs has gone unanswered by the Supreme Court.[54] Nevertheless, federal circuit and district court opinions on FECA and preemption offer some guidance on the extent to which FECA may preempt such enforcement of state law. Express preemption likely provides the greatest hurdle, though courts have read FECA's preemption clause narrowly. Meanwhile, neither field nor obstacle preemption seem too applicable, provided that states are enforcing laws of general applicability against federal scam PACs.

*Express Preemption*

FECA contains an express preemption clause, though courts have construed the clause quite narrowly. Specifically, Section 30143 of FECA states that "the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office."[55] The FEC has clarified the scope of this preemption, promulgating a rule which states that "Federal law supersedes State law concerning the (1) Organization and registration of political committees supporting Federal candidates; (2) Disclosure of receipts and expenditures by Federal candidates and political committees; and (3) Limitation on contributions and expenditures regarding Federal candidates and political committees."[56] In turn, courts have given Section 30143 "a narrow preemptive effect," often citing a "strong presumption" against preemption.[57] For instance, courts have held that FECA's preemption clause does not supersede state causes of action against waste of corporate assets,[58] state-law liability for debts of federal campaign committees,[59] or fraudulent-transfer suits brought under state law to recover money donated by fraudsters to federal party committees.[60] Consequently, while some have argued for a

[54] *See* Dewald v. Wriggelsworth, 748 F.3d 295, 301 (6th Cir. 2014) (finding that the conviction of a defendant for fraud and larceny for running federal scam PACs did not violate clearly established law under AEDPA because "no Supreme Court case has held that the FECA preempts state-law fraud claims").

[55] 52 U.S.C. § 30143(a) (2018). The only explicit exception to this preemption clause pertains to the construction of office buildings for state and local party committees. *See id.* § 30143(b).

[56] 11 C.F.R. § 108.7(b) (2021). The FEC also clarified what FECA does *not* preempt:

> The Act does not supersede State laws which provide for the (1) Manner of qualifying as a candidate or political party organization; (2) Dates and places of elections; (3) Voter registration; (4) Prohibition of false registration, voting fraud, theft of ballots, and similar offenses; (5) Candidate's personal financial disclosure; or (6) Application of State law to the funds used for the purchase or construction of a State or local party office building.

*Id.* § 108.7(c).

[57] Janvey v. Democratic Senatorial Campaign Comm., 712 F.3d 185, 200–01 (5th Cir. 2013) (quoting Karl Rove & Co. v. Thornburgh, 39 F.3d 1273, 1280 (5th Cir. 1994)); *see also* Stern v. Gen. Elec. Co., 924 F.2d 472, 475 & n.3 (2d Cir. 1991) ("The narrow wording of [Section 30143] suggests that Congress did not intend to preempt state regulation with respect to non-election-related activities."); Reeder v. Kansas City Bd. of Police Comm'rs, 733 F.2d 543, 545–46 (8th Cir. 1984) (holding that Section 30143 did not preempt a state law forbidding police officers from making political contributions to federal campaigns); Sam Levor, Note, *The Failures of Federal Campaign Finance Preemption*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 523, 531–33 (2017) ("Unlike the FEC, the courts seem more willing to narrow FECA's preemptive scope.").

[58] *Stern*, 924 F.2d at 475.

[59] *Karl Rove*, 39 F.3d at 1279–80.

[60] *Janvey*, 712 F.3d at 189, 200–01.

broad reading of Section 30143,[61] courts regularly seem to find that FECA's preemption clause does not preempt state laws that "[have] nothing to do with federal elections (or any elections, for that matter)" and instead are of general applicability.[62]

Based on this case law, state regulators are likely not expressly preempted under FECA from cracking down on federal scam PACs through general state laws, e.g., pursuing some form of fraud or larceny charges against the owners of federal scam PACs. What state regulators probably *cannot* do is institute and apply laws that specifically target federal scam PACs and their operators for misrepresenting themselves as working for a candidate or political party, because Section 30124 of FECA explicitly prohibits individuals from "fraudulently misrepresent[ing] [themselves] as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations."[63] Thus, comparable state laws would surely be preempted under a combination of Sections 30124 and 30143. This might not, however, preclude states from going after federal scam PACs for other forms of fraud. As the Western District of Texas recently noted in a mail and wire fraud case brought against the owner of various scam PACs (though brought by the federal government rather than a state government), "[Section 30124] does not govern 'fraudulent misrepresentations and solicitations of funds' generally; it governs fraudulent misrepresentation of *campaign authority*."[64]

Overall, while FECA's preemption clause may create some barriers for state regulators looking to confront federal scam PACs, state regulators would likely avoid preemption if the laws they apply are general rather than specifically intended to target federal scam PACs.

*Field and Conflict Preemption*

While FECA certainly occupies the field of federal campaign finance law, it seems unlikely that such field preemption extends to the application of general state laws to federal scam PACs. As the Supreme Court states, field preemption exists when federal regulation of a field is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[65] FECA, being so comprehensive in its regulation of federal campaign finance, would appear to satisfy this standard. Courts have, nevertheless, limited the scope of FECA's field preemption, despite recognizing it.

For instance, the Fifth Circuit has defined FECA's primary purpose as "regulat[ing] campaign contributions and expenditures in order to eliminate pernicious influence . . . over candidates by those who contribute large sums," and therefore concluded that Congress had no intention to "occupy the field" with regards to Texas's fraudulent-transfer laws.[66] Courts largely seem "unwilling to create . . . regulatory vacuum[s] without a clear indication of congressional

[61] *See, e.g.*, Dewald v. Wriggelsworth, 748 F.3d 295, 307–10 (6th Cir. 2014) (Cole, J., dissenting).
[62] Levor, *supra* note 57, at 532.
[63] 52 U.S.C. § 30124(b)(1) (2018).
[64] United States v. Prall, No. 1:19-CR-13-RP, 2019 WL 1643742, at *2 (W.D. Tex. Apr. 16, 2019) (emphasis added).
[65] English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990).
[66] Janvey v. Democratic Senatorial Campaign Comm., 712 F.3d 185, 202 (5th Cir. 2013) (quoting Karl Rove & Co. v. Thornburgh, 39 F.3d 1273, 1281 (5th Cir. 1994)).

intent,"[67] because exempting federal candidate, political, and party committees from state regulation under a theory of FECA field preemption would often, in the Fifth Circuit's words, "lead to absurd results."[68] Even the FEC recognizes that federal committees are still subject to state contract law,[69] which is noteworthy given how infrequently the FEC finds that FECA does not preempt state law.[70] Accordingly, while FECA may field preempt state laws that specifically regulate federal campaign finance, it likely does not preempt general state laws that incidentally happen to cover federal scam PACs.

Furthermore, conflict preemption seems inapplicable to the relationship between FECA and state regulation of federal scam PACs. For one, it is difficult to imagine a situation in which a federal scam PAC could not simultaneously comply with a state law being enforced against it by state regulators and any provision of FECA.[71] If anything, cracking down on federal scam PACs would complement some of FECA's provisions.[72] Second, a state law being enforced against federal scam PACs would probably not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [FECA]."[73] As noted earlier, courts have recognize FECA's primary purpose as being to eliminate improper influence over federal candidates.[74] Moreover, Section 30124 demonstrates that Congress intended for FECA to play at least some role in combatting the fraudulent solicitation of contributions and donations in federal elections.[75] Therefore, state regulators pushing back against federal scam PACs seem to not present much of an obstacle in the enforcement of FECA.

[67] Stern v. Gen. Elec. Co., 924 F.2d 472, 475 n.4 (2d Cir. 1991).
[68] *Janvey*, 712 F.3d at 202.
[69] *See* FEC Advisory Opinion 1989-02, at 2 (Apr. 25, 1990) ("The Commission has long held that State law governs whether an alleged debt in fact exists, what the amount of a debt is, and which persons or entities are responsible for paying a debt.").
[70] *See* Levor, *supra* note 57, at 530.
[71] *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (describing conflict preemption as when "compliance with both federal and state regulations is a physical impossibility").
[72] *See, e.g.*, 52 U.S.C. § 30124(b)(1) (2018).
[73] Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
[74] *See supra* note 66 and accompanying text.
[75] *See supra* note 63 and accompanying text.

## Applicant Details

| | |
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| First Name | **Paul** |
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| Contact Phone Number | **507-250-0991** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Reed College** |
| Date of BA/BS | **May 2015** |
| JD/LLB From | **University of California, Berkeley School of Law**<br>**https://www.law.berkeley.edu/careers/** |
| Date of JD/LLB | **May 21, 2021** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **California Law Review**<br>**Berkeley Journal of Employment and Labor Law** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **Yes** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Bradt, Andrew
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510-664-4984
Davis, Seth
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Gergen, Mark
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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

January 23, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I write to express my interest in a clerkship in your chambers for the 2023-2024 term. I am a 2021 graduate from Berkeley Law School, where I was co-Editor-in-Chief of the *Berkeley Journal for Employment and Labor Law,* and am presently an associate at Keker, Van Nest & Peters in San Francisco.

Enclosed are my resume, law school grade sheet, writing sample, and letters of recommendation from the following people:

- Professor Seth Davis, Berkeley Law School, sdavis@berkeley.edu, 510-642-3943
- Professor Andrew Bradt, Berkeley Law School, abradt@berkeley.edu, 510-664-4984
- Professor Mark Gergen, Berkeley Law School, mgergen@berkeley.edu, 510-643-9577

If there is any other information that would be helpful to you, please let me know. Thank you for your time and consideration.

Respectfully,

Paul Messick

**PAUL MESSICK**
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## EDUCATION

**UC BERKELEY SCHOOL OF LAW**, Berkeley, CA — J.D., June 2021

*Honors:* American Jurisprudence Award (1st in class), Contracts
Prosser Award (2nd in class), Writing and Oral Advocacy
Academic Distinction, First-Year Top 10%

*Note:* *Represented by a Racist: Why Courts Rarely Grant Relief to Clients of Racist Lawyers* 109 Cal. L. Rev. 1231 (June 2021).

*Activities:* *Berkeley Journal of Employment and Labor Law,* Co-Editor-in-Chief: 2020-2021
Research Assistant, Professor Seth Davis: Fall 2019, Spring 2020
Consumer Rights Workshop, Volunteer: 2018-2019
Queer Caucus

**REED COLLEGE**, Portland, OR — B.A., Political Science, May 2015

*Honors:* Commendation for Academic Excellence: 2013, 2014, 2015

*Thesis:* *Pathologies of the Learning Organization: A Study of the Office of Housing Recovery Operations*

*Activities:* *Reed College Quest* co-Editor-in-Chief: 2014
- Broke story of sexual harassment allegations against high-level college administrator

Student Body Vice President: 2013, 2014
- Started grant program for students who could not afford to take unpaid summer internships

## EXPERIENCE

**KEKER, VAN NEST & PETERS LLP** — Summer 2020
*Summer Associate* (*Associate beginning November, 2021*)
Wrote legal memorandum exploring mechanisms to broaden issue preclusion resulting from a successful arbitration in a related matter. Researched and drafted response to RFP concerning complex spoliation issue.

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT** — Summer 2019
*Judicial Extern, Judge Nguyen*
Drafted bench memo applying 12(b)(1) mootness and standing doctrine in a case applying Section 504 of the Rehabilitation Act. Conducted legal research and analysis of Sixth Amendment deprivation of effective assistance of counsel claims and presented my analysis to Judge Nguyen ahead of an en banc hearing. Completed research assignments on a variety of topics, including contract reformation and tribal sovereign immunity.

**SOUTHERN CALIFORNIA GAS COMPANY** — 2015-2018
*Operations Research Analyst* (*Sept. 2016 - May 2018*)
*Data Initiatives Lead* (*Oct. 2015 - Sept. 2016*)
Wrote and implemented eligibility guidelines for the Aliso Canyon relocation and reimbursement program across multiple teams and hundreds of employees. Supervised team of developers and analysts executing ad-hoc data integrity and remittance processing projects for the Aliso Canyon Incident Response Team. Designed and maintained full-stack reporting system for $385 million continuous improvement program.

**NEW YORK CITY OFFICE OF MANAGEMENT AND BUDGET** — Summer 2015
*Fiscal Unit Intern: CDBG Disaster Recovery Unit*
Responsible for federal reimbursement of $45 million Hurricane Sandy Business Loan and Grant Program (HSBLGP). Identified and resolved compliance issue that threatened federal reimbursement for more than half of HSBLGP dollars. Designed and implemented new procedures to request federal reimbursement for $7.2 million in city expenditures in four weeks—a 14x improvement over previous reimbursement submittal rate.

**NEW YORK CITY MAYOR'S OFFICE OF HOUSING RECOVERY OPERATIONS** — Summer 2013
*Policy Intern*
Co-wrote policy guidelines for "acquisition for redevelopment" recovery program allowing homeowners in areas at-risk for future flooding to sell their damaged or destroyed homes to New York City.

**INTERESTS:** Japanese "bubble" cars, rose gardening, indoor cycling

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# Berkeley Law
# University of California
# Office of the Registrar

**Paul Joseph Messick**
**Student ID: 3033425228**
**Admit Term: 2018 Fall**



Academic Program History
Major: Law (JD)

Awards

Prosser Prize 2019 Spr: Written and Oral Advocacy
Jurisprudence Award 2019 Spr: Contracts

2018 Fall

| Course | | Description | Units | Law Units | Grade |
|---|---|---|---|---|---|
| LAW | 200F | Civil Procedure<br>Andrew Bradt | 5.0 | 5.0 | H |
| LAW | 201 | Torts<br>Richard Davis | 5.0 | 5.0 | HH |
| LAW | 202.1A | Legal Research and Writing<br>Lucinda Sikes | 2.0 | 2.0 | CR |
| LAW | 230 | Criminal Law<br>Saira Mohamed | 4.0 | 4.0 | H |

| | Units | Law Units |
|---|---|---|
| Term Totals | 16.0 | 16.0 |
| Cumulative Totals | 16.0 | 16.0 |

2019 Spring

| Course | | Description | Units | Law Units | Grade |
|---|---|---|---|---|---|
| LAW | 202.1B | Written and Oral Advocacy<br>**Units Count Toward Experiential Requirement**<br>Lucinda Sikes | 2.0 | 2.0 | HH |
| LAW | 202F | Contracts<br>Mark Gergen | 5.0 | 5.0 | HH |
| LAW | 203 | Property<br>Eric Biber | 4.0 | 4.0 | P |
| LAW | 220.6 | Constitutional Law<br>**Fulfills Constitutional Law Requirement**<br>Kathryn Abrams | 4.0 | 4.0 | H |
| LAW | 286.5A | Sel Top Fed Ind Law<br>Richard Davis | 1.0 | 1.0 | CR |

| | Units | Law Units |
|---|---|---|
| Term Totals | 16.0 | 16.0 |
| Cumulative Totals | 32.0 | 32.0 |

2019 Fall

| Course | | Description | Units | Law Units | Grade |
|---|---|---|---|---|---|
| LAW | 220G | Public Law & Policy Workshop<br>Amanda Tyler | 2.0 | 2.0 | H |
| LAW | 222 | Federal Courts<br>William Fletcher | 3.0 | 3.0 | HH |
| LAW | 225.1 | Legal Institutions<br>**Fulfills 1 of 2 Writing Requirements**<br>Rachel Stern | 3.0 | 3.0 | H |
| LAW | 241 | Evidence<br>Avani Sood | 4.0 | 4.0 | H |
| LAW | 297 | Self-Tutorial Sem<br>Richard Davis | 2.0 | 2.0 | CR |

| | Units | Law Units |
|---|---|---|
| Term Totals | 14.0 | 14.0 |
| Cumulative Totals | 46.0 | 46.0 |

Carol Rachwald, Registrar

# Berkeley Law
# University of California
# Office of the Registrar

**Paul Joseph Messick**
**Student ID: 3033425228**
**Admit Term: 2018 Fall**

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2020 Spring

| Course | | Description | Units | Law Units | Grade |
|---|---|---|---|---|---|
| LAW | 206C | Note Publishing Workshop<br>Kenneth Bamberger<br>Rebecca Wexler | 1.0 | 1.0 | CR |
| LAW | 220.13 | Con Law and Colonialism<br>**Fulfills 1 of 2 Writing Requirements**<br>Richard Davis | 2.0 | 2.0 | CR |
| LAW | 226.9 | State&Local Impct Lit Prac Sem<br>**Units Count Toward Experiential Requirement**<br>Erin Bernstein<br>Jill Habig | 2.0 | 2.0 | CR |
| LAW | 226.9A | State&Local Impact Lit Pract<br>**Units Count Toward Experiential Requirement**<br>Erin Bernstein<br>Jill Habig | 2.0 | 2.0 | CR |
| LAW | 244.1 | Adv Civ Pro:Complex Civil Lit<br>Andrew Bradt | 3.0 | 3.0 | CR |
| LAW | 245.2 | Civil Trial Practice<br>**Units Count Toward Experiential Requirement**<br>Tracie Brown<br>Jeffrey White | 3.0 | 3.0 | CR |
| LAW | 297 | Self-Tutorial Sem<br>Richard Davis | 1.0 | 1.0 | CR |

| | Units | Law Units |
|---|---|---|
| Term Totals | 14.0 | 14.0 |
| Cumulative Totals | 60.0 | 60.0 |

* **Due to COVID-19, law school classes were graded credit/no pass in spring 2020.**

2020 Fall

| Course | | Description | Units | Law Units | Grade |
|---|---|---|---|---|---|
| LAW | 231 | Crim Procedure-Investigations<br>Charles Weisselberg | 4.0 | 4.0 | H |
| LAW | 244.61 | Multidistrict Litigation<br>Andrew Bradt<br>Elizabeth Cabraser | 1.0 | 1.0 | CR |
| LAW | 288.1 | Immigration Law<br>Letitia Volpp | 4.0 | 4.0 | H |
| LAW | 295.1P | Bk Jour Empl Labor<br>Kathleen Vanden Heuvel | 1.0 | 1.0 | CR |
| POLSCI | 215B | TOP CONTEM POL THRY<br>Wendy Brown | 4.0 | 4.0 | A |

| | Units | Law Units |
|---|---|---|
| Term Totals | 14.0 | 14.0 |
| Cumulative Totals | 74.0 | 74.0 |

2021 Spring

| Course | | Description | Units | Law Units | Grade |
|---|---|---|---|---|---|
| LAW | 210 | Legal Profession<br>**Fulfills Professional Responsibility Requirement**<br>Merri Baldwin | 2.0 | 2.0 | |
| LAW | 220.12 | The Constitution in Wartime<br>Amanda Tyler | 2.0 | 2.0 | |
| LAW | 223 | Administrative Law<br>Jonathan Gould | 4.0 | 4.0 | |
| LAW | 295.1P | Bk Jour Empl Labor<br>Kathleen Vanden Heuvel | 1.0 | 1.0 | |
| POLSCI | 211 | TOPICS IN POL THRY<br>Kinch Hoekstra | 4.0 | 4.0 | |

| | Units | Law Units |
|---|---|---|
| Term Totals | 0.0 | 0.0 |
| Cumulative Totals | 74.0 | 74.0 |

Carol Rachwald, Registrar

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## KEY TO GRADES

1. Grades for Academic Years 1970 to present:

| | | | | | |
|---|---|---|---|---|---|
| HH | – | High Honors | CR | – | Credit |
| H | – | Honors | NP | – | Not Pass |
| P | – | Pass | I | – | Incomplete |
| PC | – | Pass Conditional or Substandard Pass (1997-98 to present) | IP | – | In Progress |
| NC | – | No Credit | NR | – | No Record |

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

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**Paul Messick**
**Reed College**
**Cumulative GPA: 3.52**

**2011-2012**

| COURSE | INSTRUCTOR | GRADE | CREDIT UNITS | COMMENTS |
|---|---|---|---|---|
| West Humanities: Greece & Rome | Michael Breen & Michael Faletra | B+ | 3 | |
| First Year French | Jeannine Murray-Román | B+ | 2 | |
| Chemical Reactivity | Margret Geselbracht & Wendy Breyer | C | 1 | |
| Molecular Structure & Properties | Margret Geselbracht & Wendy Breyer | B- | 1 | |
| Introduction to International Politics | Alex Montgomery | A | 1 | |

**2012-2013**

| COURSE | INSTRUCTOR | GRADE | CREDIT UNITS | COMMENTS |
|---|---|---|---|---|
| Introduction to Psychology II | Daniel Reisberg | A | 1 | |
| Introduction to Public Policy | Chris Koski | A+ | 1 | |
| Law and Economics | Noelwah Netusil | A | 1 | |
| Introduction to Psychology I | Kathryn C. Oleson | B | 1 | |
| Introduction to Economic Analysis | Kimberly Clausing | A- | 1 | |
| State and Local Politics | Chris Koski | A- | 1 | |
| Second Year French | Ann Delehanty | B+ | 2 | |

Commended for Excellence in Scholarship

**2013-2014**

| COURSE | INSTRUCTOR | GRADE | CREDIT UNITS | COMMENTS |
|---|---|---|---|---|
| American Diplomacy | Josh Howe | A- | 1 | |
| Statistics and Data Analysis | Paul Gronke | B+ | 1 | |
| Liberalism and its Critics | Tamara Metz | A- | 1 | |
| Neoliberalism and its Critics | Tamara Metz | A- | 1 | |
| The Art of Capitalism | Kris Cohen | B+ | 1 | |
| Introduction to Art History | Dana Katz | A- | 1 | |
| Introduction to Political Philosophy | Darius Rejali | A- | 1 | |
| Judgment | Peter Steinberger | B+ | 1 | |

Commended for Excellence in Scholarship

**2014-2015**

| COURSE | INSTRUCTOR | GRADE | CREDIT UNITS | COMMENTS |
|---|---|---|---|---|
| Treaty Ports to Megacities | Doug Fix | A | 1 | |
| American Capitalism | Marc Schneiberg | B+ | 1 | |

| | | | | |
|---|---|---|---|---|
| Thesis (Political Science) | Alex Montgomery | A- | 2 | Independent project supervised by Professor Alex Montgomery. |
| Constitutional Law and Judicial Politics | Stephan Kapsch | A+ | 1 | |
| The Idea of the State | Peter Steinberger | A | 1 | |
| Nuclear Politics | Alex Montgomery | A | 1 | |

Commended for Excellence in Scholarship

**Grading System Description**

ACADEMIC RIGOR

The average GPA for all students in 2013–14 was 3.15 on a 4.00 scale. This figure has increased by less than 0.2 of a grade point in the past 30 years. During that period, only eleven students have graduated from Reed with perfect 4.00 grade averages.

2013–14 GRADUATING CLASS

10% graduated with a GPA of 3.71 or higher 25% graduated with a GPA of 3.49 or higher Average GPA—3.20

The absence of grade inflation at Reed reflects the rigor of the academic program and the high standards set by the faculty, rather than any deficiency in the quality of the student body.

GRADING POLICY

Students are encouraged to focus on learning, not on grades. Students are evaluated rigorously, and semester grades are filed with the registrar, but by tradition, students do not receive standard grade reports. Papers and exams are generally returned to students with lengthy comments but without grades affixed. There is no dean's list or honor roll, and Reed does not award Latin honors at graduation.

May 8, 2020

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

It is a pleasure to recommend Paul Messick, Berkeley Law Class of 2021, for a clerkship in your chambers. Paul has been my student in both first-year Civil Procedure and my course in Complex Litigation. In both classes, he has been excellent in all respects—in class and office hours, and on his exams. Based on my personal experience with Paul, his across-the-board excellence in law school, and his work experience, I have no doubt that he will be a superb member of your chambers team.

I met Paul in his first semester of law school when he was a student in my Civil Procedure class. This was a big group—106 students—but Paul stood out from the beginning. He was extremely well prepared when called upon from the very beginning, not common for students in the first month of law school, particularly in my class, when I cold-call students and stay with them (humanely, I hope) for around twenty minutes. Paul was also a regular volunteer and visitor to my office hours, where he demonstrated deep engagement with the material. And he did much of this after suffering a collapsed lung, a significant health problem to be sure, but Paul did not miss a beat. It came as no surprise to me that Paul achieved an Honors grade on his final exam, no easy feat in a group that talented. It also comes as no surprise that Paul's performance in law school generally is equally impressive, especially his High Honors grade in Judge Fletcher's Federal Courts class, a course that typically attracts many of the top students in the law school.

I was very pleased that Paul enrolled in my Complex Litigation class this spring. The course is a tough one—it focuses on Multidistrict Litigation and class actions, and I do not pull punches when it comes to the challenging questions these doctrines pose. As usual, Paul honed in on the toughest questions, particularly those involving the preclusive effects of these cases in different jurisdictions and the challenges of non-class aggregate settlements. Moreover, when we had to switch suddenly to remote instruction due to the coronavirus, Paul again did not miss a beat. He continued to be an excellent participant in the class, albeit via Zoom, and although we have moved to a pass/fail format, I can affirm that Paul's performance in the class was exemplary, and based on his participation I am confident that he has mastered the key concepts in the class.

Additionally, I should note that Paul will come to you well prepared by his work experiences. He served as a judicial intern last summer for Judge Nguyen of the Ninth Circuit, and he will be working this summer for Keker, Van Nest & Peters, in my view the best boutique litigation firm in San Francisco.

And, finally, I should note that Paul is a really nice person. He has a calm manner, a self-deprecating sense of humor, and varied interests. Indeed, some of our most fun conversations over the years have involved our shared interest in cars. I am very confident that you will enjoy having him around and that he will fit beautifully with his colleagues in chambers.

Sincerely,

Andrew D. Bradt
Professor of Law

Andrew Bradt - abradt@berkeley.edu - 510-664-4984

May 7, 2021

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I write enthusiastically to recommend Paul Messick for a clerkship in your Chambers. Paul has worked with me as a research assistant and has also been a student in my Fall 2018 Torts class, Spring 2019 Selected Topics in Federal Indian Law seminar, and Spring 2020 Constitutional Law and Colonialism seminar. Paul is a brilliant and creative thinker with a particular interest in the federal courts. I believe he would be an outstanding clerk.

Paul has been an excellent research assistant. Several features of his work stand out. First, Paul is comprehensive and fast. He gets his arms around doctrine and scholarship and synthesizes them quickly. For example, I had a time-sensitive research question about a line of Supreme Court doctrine. Within twenty-four hours Paul responded with a lengthy memorandum summarizing the doctrine and offering several of his own thoughts about it. Second, Paul is curious and focused. He follows up leads I did not think of but does not go down rabbit holes. Of the many student research assistants I have worked with, Paul is one of the top three.

Paul's record as a student needs little elaboration. He has earned High Honors in multiple classes, including my Torts class as well as Federal Courts, and has won both a Jurisprudence Award and a Prosser Prize. One of my principal fields of scholarship is Federal Courts. Paul and I have worked closely in that field in connection with my scholarship, and we have had many conversations about it. He is deeply interested in the federal judiciary, as is reflected in his paper for my Constitutional Law and Colonialism class. That paper is a sophisticated scholarly reflection on judicial legitimacy. In it, Paul develops a counterintuitive and interesting justification for several much-criticized Federal Indian Law precedents. While I have been one to criticize those precedents, I will say that Paul's thesis has provoked me to think more deeply about them.

Unsurprisingly, I think that Paul has the creativity and intellectual firepower to be a legal academic. I know he is considering that possibility seriously. His Note, which is forthcoming in the California Law Review, has the sort of ambition that is characteristic of students who go on to be law professors. That intellectual ambition – and Paul's uncommon work ethic – will serve him well in a judicial clerkship.

In short, I have worked closely with Paul and believe he has the intellectual curiosity, as well as the clarity of thought and writing, necessary to excel as a clerk. Please do not hesitate to contact me with any questions. You may reach me at sethdavis@berkeley.edu or at 813-428-3331.

Sincerely,

Seth Davis
Professor of Law,
University of California School of Law

May 26, 2020

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

Paul Messick is the strongest candidate for a clerkship for whom I am writing a letter this year. He was so impressive in my Contracts class in Spring 2019 and in occasional meetings in my office that I offered to write this letter before he took the final exam. Messick got the highest score on the exam and received the Jurisprudence Award. He stood out in a class of over 100 students in the best possible ways. His occasional interjections in class were always spot on. He was a leader in the class. At one point I made a faux pas in the class. Messick approached me after the class and offered cogent advice, which I took.

I have met with Messick outside of class both individually and with his study group. He was impressive in both settings. In the group setting, he contributed a great deal without dominating the group. The sessions with his group by the end of the semester were like high-powered, brain-storming sessions with experienced lawyers, taking apart difficult problems from my old exams (which are based on real cases) and identifying the pivotal issues of fact and law. One-on-one we would talk about his career plans. He told me he hoped to work for an elite, small plaintiff's litigation firm, and perhaps to clerk, but that he wasn't sure he was qualified. Messick under-estimates himself. This is a good thing. He is also a very nice person.

Messick shared a draft of a note he wrote for the California Law Review with me as a writing sample. The paper is beautifully written. It makes a sophisticated point about how judicial norms make it difficult for judges to directly address an ineffective assistance of counsel claim based on the racist views of appointed defense counsel. The paper uses a recent 9th Circuit en banc decision allowing the claim but on narrow, procedural grounds.

Messick has the talent and insight to pursue an academic career, if he chose to. Looking at his resume, I expect he will end up in a position in government or the private sector helping to manage the response to the Pandemic. Before coming to law school, he worked for SoCal Gas in a unit distributing recovery funds after the Alioso Canyon leak. Before this he worked in New York Sandy in an office distributing recovery funds after Hurricane Sandy. And he has worked with the homeless both in New York and Los Angeles. His under graduate major was in Political Science and his thesis was on organizational pathologies.

I know you are flooded with high quality applicants. Messick belongs at the top of your pool. If he is, and you would like more information, please reach out to me.

Sincerely,

Mark Gergen
Associate Dean for Faculty
Development and Research

Mark Gergen - mgergen@law.berkeley.edu

Paul Messick

This brief is based on a hypothetical fact pattern from a written and oral advocacy class. The research, analysis, and writing are my own, including revisions based on comments provided by my professor. Where indicated, portions of this brief have been eliminated for purposes of brevity. I would be happy to provide the complete brief upon request.

## I. INTRODUCTION

Congress structured the Freedom of Information Act's (FOIA) Exemption 6 to allow withholding of personal information where disclosure would be a "clearly unwarranted violation of personal privacy." 5 U.S.C. § 552(b)(6) (2012). Cognizant of Congress's intent to protect personal privacy in FOIA proceedings, the Federal Highway Administration (FHWA) properly withheld a video containing the last known images of four construction workers killed by a collapsing support structure minutes after the video was filmed. The FHWA released a transcript of the Caveman Tragedy Video in response to requests by the Workers Defense Project (WDP) but withheld the video itself to protect surviving families' significant privacy interests in their relatives' death scene images. Nonetheless, the WDP seeks release of the Caveman Tragedy Video and filed suit to compel disclosure after exhausting its administrative appeals.

Releasing the Caveman Tragedy Video would constitute a clearly unwarranted invasion of personal privacy for the surviving family members without revealing any information about FHWA activities not found in the transcript or other publicly available sources. Any public interest in the video's release is therefore *de minimis* and does not outweigh the substantial privacy interests of the surviving families to grieve without being unwittingly exposed to the last known images of their loved ones.

What is at issue here are the ineffable human qualities that lend the video emotional weight. These qualities embody significant privacy interests protected by Exemption 6.

Accordingly, the FHWA respectfully moves for summary judgment in order to preserve the privacy interest of the Caveman Four's surviving family members.

## II. STATEMENT OF FACTS

The Caveman Tragedy Video contains the last known images of four Oregon DOT highway workers: Carlos Cabrillo, James McCoy, Jorge Garcia, and Phil Smith. Finfrock Decl. ¶ 22. Portions of a support structure collapsed and killed the Caveman Four just thirty minutes after taping the video. *Id.* ¶ 18. The video was originally intended to encourage State DOT offices to apply for Competitive Highway Bridge Program (CHBP) funding and was to be posted on the FHWA website. *Id*. ¶ 14.

The WDP requested the FHWA release the Caveman Tragedy Video for use in an educational video and to aid in the advocacy work of the WDP. Finfrock Decl. Ex. A. The FHWA denied the request pursuant to FOIA's Exemption 6, arguing that disclosure of the video would constitute a clearly unwarranted invasion of personal privacy. Finfrock Decl. Ex. B. Upon appeal by WDP, FHWA released a transcript of the Caveman Tragedy Video, but reaffirmed its withholding of the video itself due to the anguish that would be inflicted on surviving family members upon seeing "graphic reminder" of their loved ones if the video were released. Finfrock Decl. Ex. D.

The Caveman Tragedy Video consists of two parts: an introduction of the CHBP by Deputy Administrator Hendrickson, and an interview with Carlos Cabrillo and James McCoy. Finfrock Decl. Ex. E. Hendrickson's introduction reviews the CHBP application requirements and the history of the Caveman Bridge. *Id*. The CHBP application requirements are widely available on the internet. *See* Finfrock Decl. Ex. F.

The interview with Cabrillo and McCoy is personal and intimate. In it, Cabrillo and McCoy first recount their personal connections to the bridge and the Grants Pass area. Finfrock Decl. Ex. E. Then, Cabrillo describes his wedding. *Id*. The Caveman Four all attended Cabrillo's wedding the weekend before their deaths; McCoy and Garcia both join the interview to reflect on the beauty of the ceremony. *Id*. Cabrillo describes his desire for a large family, explaining that "my kids will hear stories" about Cabrillo working on the bridge, just as McCoy heard stories about his own grandfather working on the construction of the Caveman Bridge in 1930. *Id.* Each of the Caveman Four has several living family members who could identify them in the video. *Id.* ¶ 22. Moreover, each of the workers are identifiable at all times throughout the video. *Id*. For these reasons, FHWA determined that no portion of the video is segregable. *Id.* ¶ 24.

The Caveman Tragedy Video "does not reveal any information about what led to the collapse of the support structure." *Id*. ¶ 23. The video's transcript contains no discussion of the construction practices used to rehabilitate the bridge beyond mentioning the scope of the rehabilitative work described in Finfrock Declaration Exhibits F-G. There is nothing in the transcript to indicate that the camerawoman, FHWA Public Affairs specialist Susan Lee, trained her lens on any specific aspects of the construction work. Finfrock Decl. Ex. E.

In the aftermath of the collapse, the Caveman Bridge Tragedy drew considerable media attention in print and television outlets with millions of subscribers. Huerte Decl. ¶ 7 n.1. TV news stations included footage of the individual memorial services of three of the four workers. *Id.* ¶ 8. The media attention was so intense, however, that the family of Jorge Garcia asked the media to refrain from "filming *or reporting* on his memorial service." *Id.* ¶ 8 (emphasis added). While national coverage of the collapse has subsided, several local papers continue to cover the investigations into the cause of the collapse. *Id*. ¶ 7. Notably, Cabrillo and McCoy, if not the

other members of the Caveman Four, resided in the Grants Pass area with their families before their untimely deaths. Finfrock Decl. Ex. E.

## III. ARGUMENT

### A. Summary judgment is appropriate in this case.

**[OMITTED]**

### B. The Caveman Tragedy Video falls under Exemption 6 because surviving family members have a significant privacy interest in the video and any public interest that would be served by its release is de minimis at best.

FOIA is intended to increase the transparency of government, and the functioning of democracy by letting citizens know "what their government is up to." *United States Dep't. of Justice v. Reporters Comm.*, 489 U.S. 749, 773 (1989). FOIA requires agencies to make records available unless they fall under one of nine exemptions allowing withholding. 5 U.S.C. § 552(a)(3) (2012). There are two types of exemptions protecting personal privacy: Exemption 7(C), which specifically encompasses law enforcement records, and Exemption 6.

Exemption 6 protects files similar to personnel or medical files where disclosure would be a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (2012). Exemption 7(C) omits the adverb "clearly" and substitutes "could reasonably be expected" for "would constitute" in Exemption 6. *Reporters Comm.*, 489 U.S. 749, 756 (1989). These changes lower the threshold for finding an invasion of privacy interests in cases involving law enforcement records. *Id.* The difference between Exemptions 6 and 7(C) lies in the *magnitude* of the public interest required to outweigh the privacy issue at hand, rather than a categorical distinction between two modes of analysis. *United States Dep't of Defense v. FLRA*, 510 U.S. 487, 497 n.6 (1994). For this reason, cases affecting Exemption 7(C) can be analogized to cases concerning Exemption 6, albeit under the stricter Exemption 6 wording. *Id.*

Paul Messick

To determine whether Exemption 6 protects documents from disclosure, courts review agency action *de novo* through a four step analysis. *Multi Ag Media LLC v. Dep't of Agriculture*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). First, courts determine if the contested information is a personnel, medical, or "similar file." 5 U.S.C. §552(b)(6) (2012). Second, courts determine whether there is a significant privacy interest in the requested information. *Multi Ag Media LLC,* 515 F.3d at 1229. Third, if privacy concerns are present, the requester must establish a FOIA public interest in disclosure. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). Fourth, the court balances the privacy concerns with the reason for disclosure to determine whether disclosure "would constitute a clearly unwarranted invasion of personal privacy." *DOD v. FLRA*, 510 U.S. 487, 495 (1994).

The balance is clear: the rights of surviving family members not to be retraumatized by images of their loved ones minutes before their deaths far outweighs the ostensible public interest in using those same emotional images for publicity. As a result, summary judgment should be granted in favor of the Federal Highway Administration.

**1. The Caveman Tragedy Video is a similar file for the purposes of Exemption 6 because it contains video and audio of recognizable individuals.**

**[OMITTED]**

**2. The surviving families have a substantial privacy interests in the Caveman Tragedy Video as they would almost certainly be exposed to it and contacted by parties seeking their comment.**

**[OMITTED]**

**3. There is no public interest in disclosing the Caveman Tragedy Video as its release would add nothing to the public's understanding about the accident or the government's conduct surrounding it.**

As there is a significant privacy interest in the release of the Caveman Tragedy Video, the requester next bears the burden of establishing disclosure would serve the public interest. *See Favish*, 541 U.S. at 172. The *only* relevant public interest to be considered is the extent to which disclosure would "serve FOIA's core purpose of contributing significantly to public understanding of the Government's operations or activities." *Dep't of Defense v. FLRA*, 510 U.S. at 487. The availability of information through other sources discounts the public interest in the contested information accordingly. *Dep't of Defense v. FLRA*, 964 F.2d 26, 29-30 (D.C. Cir. 1992). There is no public interest in disclosure that reveals "little or nothing about an agency's *own conduct*." *Reporters Comm.*, 489 U.S. at 773 (emphasis added).

In *NASA II* the court determined releasing the tape of the astronauts' fatal ascent would not further the "undeniable public interest in learning about NASA's conduct before, during and after the Challenger disaster … in any way." *NASA II*, 782 F. Supp. at 632. The tape, the court concluded, revealed little or nothing about the agency's actions because "whether the astronauts knew or did not know about the explosion says nothing about the operations of NASA." *Id.* at 633. The court emphasized that, due to the release of the transcript containing "every word that was spoken in the cabin," any information gleaned from the inflection of the astronauts' voices was "extremely speculative." *Id.* As a result, any information derived from the astronauts' inflection and background noises could not "significantly contribute" to the public understanding of the Challenger disaster. *Id.* Therefore, the public interest in disclosure of the tape was "very minimal, if it can even be said to exist at all." *Id.*

Paul Messick

In *Hertzberg v. Veneman*, the court ordered the *in camera* review of videos taken of a wildfire as the declarations presented were insufficient to prove release of the videos would not further the public interest. 273 F. Supp. 2d 67, 90 (D.D.C. 2003). The court focused its review on whether release of the videos would show the environmental conditions during the fires or permit the public to evaluate the Forest Service's response to the Bitterroot wildfire—including whether the agency failed to perform its official functions. *Id.* While the tapes did not include images of any Forest Service personnel or any "government operations in progress," the court found a public interest could be present in their release if the tapes "contain[ed] information about how the Forest Service responded to the crisis and performed its official functions" *Id.*

In *Advocates for Highway Safety v. Fed. Highway Admin.*, the court ruled that a public interest existed in the disclosure of videotapes used as the raw data for a federally-funded safety study on fatigued driving. 818 F. Supp. 2d 122, 125, 131 (D.D.C. 2011). The court found a public interest in the videos because their release would have shed light on FHWA's expenditure of public funds and promulgation of agency rules. *Advocates*, 818 F. Supp. 2d at 131. Because the videos were gathered as part of a study that "spanned seven years and cost $4.5 million . . . [t]he public has an interest in seeing how and why taxpayers' money was spent." *Id.* More importantly for the court's analysis, the "landmark" study in question informed subsequent rulemaking by the FHWA affecting the trucking industry. *Id.* at 126. "When the agency relies on information in formulating a rule," the court reasoned "there is a strong public interest in disclosing the underlying information, even if it relates to particular individuals." *Id.* at 127.

Here, any public interest is *de minimis* due to the speculative nature of non-lexical information in the Caveman Tragedy Video and is further diminished by the availability of contested information elsewhere. First, any public interest in the presence of Deputy

Administrator Hendrickson is satisfied by the transcript. Although Hendrickson's stated purpose in visiting the Caveman Bridge was to "learn first-hand about the construction practices" being used, the transcript includes no discussion of construction practices. Finfrock Decl. Ex. E. In *NASA II*, the released transcript rendered the public interest in the astronauts' voices speculative. *See NASA II*, 782 F. Supp. at 632. Here, FHWA released a transcript of the Caveman Tragedy Video revealing no discussion or inspection of construction practices. *See id.* Investigation by government officials has shown there is no connection between the contents of the Caveman Tragedy Video and the structure's collapse. Finfrock Decl. ¶ 23. Because Hendrickson's words have been made public, there is no inspection of construction practices noted in the transcript, and government investigation has demonstrated there is no information in the Caveman Tragedy Video that sheds light on the collapse, the presence of a public interest in non-lexical information here is as least as speculative as in *NASA II*. Finfrock Decl. ¶ 23, Ex. E.

Second, if any public interest exists in the background noises and wide-angle shots of the bridge indicated in the transcript, that interest is *de minimis* as the Caveman Tragedy Video does not show how the FHWA responded to the collapse, nor information about FHWA official functions not available elsewhere. Unlike *Hertzberg*, where the videos may have shown how the Forest Service responded to the fires, here the Caveman Tragedy Video cannot possibly show the FHWA's response as the video was taken before the collapse occurred. *See Hertzberg*, 273 F. Supp. 2d at 90. Whereas the Forest Service was directly implicated in creating the conditions that led to the Bitterroot wildfire, here FHWA's involvement was limited to funding construction designed and executed by Oregon's DOT. *See Hertzberg*, 273 F. Supp. 2d at 73; Finfrock Decl. Exs. E, F. Disclosure of the Caveman Tragedy Video would not reveal anything about the FHWA's *own conduct,* only the conduct of Oregon's DOT. *See Reporters Comm.*, 489 U.S. at

773 (indicating the absence of public interest in disclosure revealing little about an agency's own conduct). Because information about Oregon DOT safety practices are available elsewhere and will be incorporated into other investigations, public interest based on a theory of showing FHWA's official functions relating to safety or construction practices is *de minimis* at best.

Third, the video would not provide any information about how taxpayers' money is being spent not available from other publicly accessible sources. *See* Finfrock Decl. Exs. F, G. Unlike *Advocates*, where the videos of the truckers' faces formed the basis of the study and served as the object of the government's expenditure, here the video is merely educational and ancillary to the CHBP's $225 million budget. *See Advocates*, 818 F. Supp. 2d at 126; Finfrock Decl. ¶ 14. Information about CHBP bridge construction and rehabilitation—the object of the government's expenditure—is illuminated by the budgets and plans for CHBP projects. The record shows this information is available elsewhere and the public interest in the information is diminished accordingly. *See DOD v. FLRA*, 964 F.2d at 29-30; Finfrock Decl. Ex. F.

Fourth and finally, release of the Caveman Tragedy Video would not inform administrative rulemaking in response to the collapse. Any rulemaking not derived from the collapse itself would logically be informed by ongoing state and OSHA investigations. Huerte Decl. ¶ 6. Unlike *Advocates*, where the videos of truckers' faces provided the necessary data to promulgate new rules affecting the trucking industry, here there is merely a speculative possibility of the Caveman Tragedy Video informing rulemaking. *See Advocates*, 818 F. Supp. 2d at 126; Finfrock Decl. ¶ 23. Nothing in the transcript suggests there was any attention paid to construction or safety practices of the Caveman Four beyond a wide-angle shot taken at such a distance that the entire bridge is in view behind Deputy Administrator Hendrickson. Finfrock Decl. Ex. E. This strongly suggests the potential for the Caveman Tragedy Video's use in

rulemaking is minimal, and the strong public interest in disclosure articulated in *Advocates* does not apply here. *See Advocates*, 818 F. Supp. 2d at 127.

**4. The balance between the substantial privacy interest and *de minimis* public interest in the release of the Caveman Tragedy Video is firmly weighted towards non-disclosure.**

Where the privacy interest is substantial, and the public interest minimal or uncertain, the balance tips towards non-disclosure. *See DOD v. FLRA*, 510 U.S. at 495; *NASA II,* 782 F. Supp. at 633. In *NASA II*, the surviving families' privacy interests were substantial because they would face a "disruptive assault on their privacy were the tape disclosed." 782 F. Supp. at 632. Here, surviving families have a significant privacy interest in the Caveman Tragedy Video because they would similarly be unwittingly exposed and sought out for comment. In *NASA II*, the public interest was speculative because a complete transcript was released and information gathered from background noises would not have shed any light on NASA's operations. *Id.* at 633. Here, too, the government has made a transcript of the video available to the public. Because the public interest here is both speculative and diminished by the availability of information through other sources that do not implicate the surviving families' privacy interests, the public interest is *de minimis*. *See DOD v. FLRA*, 964 F.2d at 29-30. Consequently, the substantial privacy interest in non-disclosure outweighs the speculative public interest presented.

## IV. CONCLUSION

For the foregoing reasons, summary judgment should be granted in favor of the FHWA.

## Applicant Details

| | |
|---|---|
| First Name | **Claire** |
| Middle Initial | **E** |
| Last Name | **Molholm** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **cmolholm@gmail.com** |
| Address | **Address**<br>Street<br>**805 Saint Johns Place, Apt 2L**<br>City<br>**Brooklyn**<br>State/Territory<br>**New York**<br>Zip<br>**11216**<br>Country<br>**United States** |
| Contact Phone Number | **9178387147** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Oberlin College** |
| Date of BA/BS | **December 2013** |
| JD/LLB From | **University of California, Berkeley School of Law**<br>**https://www.law.berkeley.edu/careers/** |
| Date of JD/LLB | **May 21, 2021** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Berkeley Law Journal of Employment and Labor Law** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **No** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

| | |
|---|---|
| Specialized Work Experience | **Immigration** |

## Recommenders

Cole, Michelle
michellecole@law.berkeley.edu
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Belsher, Amy
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Oppenheimer, David
doppenheimer@law.berkeley.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**Claire Elizabeth Molholm**
805 Saint Johns Place APT. 2L, Brooklyn, NY 11216 • (917) 838-7147 • cmolholm@gmail.com

March 29, 2022

The Honorable Eric N. Vitaliano
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Vitaliano,

I am a Legal Fellow at the New York Civil Liberties Union and a recent graduate of the University of California, Berkeley, School of Law. I am writing to apply for a clerkship in your chambers for the 2023 term because I am an aspiring civil rights attorney and am moved by your commitment to public service. As a native New Yorker, I am excited by the possibility of working in the Eastern District of New York to help resolve pressing issues facing my community. A federal district clerkship would further my goals of practicing affirmative litigation by deepening my understanding of the law and improving my writing to ensure that I can be the best advocate for my future clients.

My dedication to learning practical skills and strengthening my writing has prepared me for the challenges of clerking. My public service internships, field placements, and clinical experience in addition to my four years as a paralegal have taught me how to adapt to different work environments while helping me build foundational legal skills. Throughout law school, I prioritized advancing my writing and editing skills. I served as the Senior Articles Editor for the *Berkeley Journal of Employment and Labor Law*, took multiple writing courses, for which I was awarded highest honors, and worked as a Research Assistant to Professor David Oppenheimer in writing submissions for his casebook*, Comparative Equality and Anti-Discriminaiton Law*. Through working in direct services and as a Teaching Assistant to Professor Michelle Cole, I improved my communication abilities, learning how to build trust, give feedback, and collaborate for a shared goal. These skills will make me an asset to chambers as I am an adept writer, experienced editor, and thoughtful communicator.

As a Legal Fellow at the New York Civil Liberties Union, I have not only enhanced these foundational skills, but also gained invaluable federal litigation experience. I have broadened my legal knowledge by working on a wide range of cases, from assessing justiciability questions before filing a complaint to addressing complex statutory interpretation issues on appeal. In this role, I have had the unique opportunity to develop a Fourth Amendment case, which has solidified my research skills and improved my critical thinking. Through drafting briefs with my colleagues, I have also gained the necessary collaboration skills for clerking. This process has taught me how to adapt my writing to meet my supervisors' needs, conducting research with their objectives in mind and mirroring their writing style to build one cohesive argument, ultimately preparing me for the task of honoring a judge's vision.

I am enclosing a resume, law school transcript, undergraduate transcript, and writing sample. Recommendation letters from Professor Michelle Cole (510-643-1097, michellecole@law.berkeley.edu), Professor David Oppenheimer (510-643-3225, doppenheimer@law.berkeley.edu), and Senior Staff Attorney Amy Belsher (212-607-3342, abelsher@nyclu.org) are also enclosed.

I would welcome an opportunity to interview with you. Thank you for your time and consideration.

Sincerely,

Claire Molholm

**Claire Elizabeth Molholm**
805 Saint Johns Place APT. 2L, Brooklyn, NY 11216 • (917) 838-7147 • cmolholm@gmail.com

## EDUCATION

**University of California, Berkeley, School of Law**, Berkeley, CA, Juris Doctorate, May 2021

| | |
|---|---|
| Honors: | Third-Year Academic Distinction (Top 25%) |
| | Jurisprudence Award (First in Class), 2021 Spring Advanced Legal Writing |
| | Best Brief Award, Written and Oral Advocacy (1L) |
| Certificates: | Public Interest & Social Justice Certificate |
| Positions: | *Berkeley Journal of Employment and Labor Law*, Senior Articles Editor |
| | Teaching Assistant, Professor Michelle Cole, Written and Oral Advocacy |
| | Research Assistant, Professor David Oppenheimer |
| Activities: | Bales Mock Trial Competition, La Raza Workers' and Tenants' Rights Clinics, |
| | California Asylum Representation Project |

**Oberlin College,** Oberlin, OH, Bachelor of Arts, Politics, December 2013

**Bard College, Bard High School Early College,** New York, NY, Associate of Arts, June 2010

## PROFESSIONAL EXPERIENCE

**The New York Civil Liberties Union,** New York, NY — Sept. 2021 – Present
*Legal Fellow*
Develop and litigate civil rights cases by researching and writing briefs and memoranda, participating in settlement conferences, working on discovery matters, and investigating and collecting evidence.

**Lawyers' Committee for Civil Rights**, San Francisco, CA — Aug. 2020 – Dec. 2020
*Law Clerk, Immigrant Justice*
Provided research and writing support for COVID-19 federal litigation advocating for detainee rights.

**Brooklyn Defender Services,** Brooklyn, NY — Summer 2020
*Law Clerk, Immigration Unit, NYIFUP*
Wrote motions to suppress, motions to continue, and motions to terminate, regarding federal criminal procedure, constitutional rights, and habeas matters.

**East Bay Community Law Center**, Berkeley, CA — Jan. 2020 – May 2020
*Clinical Student, Immigration Services*
Wrote an asylum brief and legal memoranda. Prepared Special Immigrant Juvenile Status and asylum cases.

**San Francisco Public Defender's Office**, San Francisco, CA — Aug. 2019 – Dec. 2019
*Law Clerk, Immigration Unit*
Assisted in the representation of detainees, wrote motions to reopen and motions to vacate conviction, and prepared federal habeas corpus petitions and state administrative complaints.

**Office of the State Public Defender**, Oakland, CA — Summer 2019
*Law Clerk*
Wrote legal memoranda concerning *Batson* claims and juror dismissal for death penalty appeals.

**Disability Rights Advocates**, Berkeley, CA & New York, NY — Nov. 2015 – May 2017
*Paralegal*
Conducted investigative research, wrote declarations, prepared discovery, and assisted with filings.

**Law Office of Robert B. Jobe**, San Francisco, CA — May 2014 – Sept. 2015
*Bilingual Immigration Paralegal*
Conducted client intake, wrote declarations, collected and organized documents, filled out applications, translated documents, and filed cases.

## LANGUAGE SKILLS & INTERESTS:

Professionally fluent in Spanish. Cooking, surfing, skiing, film, and dance.

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TELEPHONE: 510-643-2278

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805 SAINT JOHNS PLACE
APT 2L
BROOKLYN, NY 11216-4278

E-Mail: cmolholm@gmail.com

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805 SAINT JOHNS PLACE
APT 2L
BROOKLYN, NY 11216-4278

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# Berkeley Law
# University of California
# Office of the Registrar



Claire Elizabeth Molholm
Student ID: 3033525213
Admit Term: 2018 Fall

Printed: 2022-03-04 10:56
Page 1 of 2

Degrees Awarded
Juris Doctor 05/19/2021

Academic Program History
Major: Law (JD)

Awards

Public Interest & Social Justice Certificate
Written & Oral Advocacy: Best Brief 2019 Spr
Jurisprudence Award 2021 Spr: Advanced Legal Writing

2018 Fall

| Course | | Description | Units | Law Units | Grade |
|---|---|---|---|---|---|
| LAW | 200F | Civil Procedure<br>David Oppenheimer | 5.0 | 5.0 | HH |
| LAW | 202.1A | Legal Research and Writing<br>Michelle Cole | 2.0 | 2.0 | CR |
| LAW | 202F | Contracts<br>Abbye Atkinson | 5.0 | 5.0 | P |
| LAW | 203 | Property<br>Holly Doremus | 4.0 | 4.0 | P |

| | Units | Law Units |
|---|---|---|
| Term Totals | 16.0 | 16.0 |
| Cumulative Totals | 16.0 | 16.0 |

2019 Spring

| Course | | Description | Units | Law Units | Grade |
|---|---|---|---|---|---|
| LAW | 201 | Torts<br>Richard Davis | 5.0 | 5.0 | H |
| LAW | 202.1B | Written and Oral Advocacy<br>**Units Count Toward Experiential Requirement**<br>Michelle Cole | 2.0 | 2.0 | HH |
| LAW | 220.6 | Constitutional Law<br>**Fulfills Constitutional Law Requirement**<br>Ian Haney Lopez | 4.0 | 4.0 | P |
| LAW | 230 | Criminal Law<br>Charles Weisselberg | 4.0 | 4.0 | P |

| | Units | Law Units |
|---|---|---|
| Term Totals | 15.0 | 15.0 |
| Cumulative Totals | 31.0 | 31.0 |

2019 Fall

| Course | | Description | Units | Law Units | Grade |
|---|---|---|---|---|---|
| LAW | 241 | Evidence<br>Avani Sood | 4.0 | 4.0 | H |
| LAW | 264.5 | Comp Equal Anti-Dis<br>David Oppenheimer | 2.0 | 2.0 | P |
| LAW | 295.6B | Criminal Field Placement<br>**Units Count Toward Experiential Requirement**<br>Susan Schechter | 4.0 | 4.0 | CR |
| LAW | 295C | Criminal Law Ethics Seminar<br>**Fulfills Either Prof. Resp. or Experiential**<br>Susan Schechter<br>Prithika Balakrishnan | 2.0 | 2.0 | HH |
| LAW | 297 | Self-Tutorial Sem<br>David Oppenheimer | 1.0 | 1.0 | CR |

| | Units | Law Units |
|---|---|---|
| Term Totals | 13.0 | 13.0 |
| Cumulative Totals | 44.0 | 44.0 |

2020 Spring

| Course | | Description | Units | Law Units | Grade |
|---|---|---|---|---|---|
| LAW | 208 | Advanced Legal Research<br>**Units Count Toward Experiential Requirement**<br>Michael Levy<br>Kathleen Vanden Heuvel | 3.0 | 3.0 | CR |
| LAW | 223 | Administrative Law<br>Kenneth Bamberger | 4.0 | 4.0 | CR |
| LAW | 289 | EBCLC Seminar<br>Rosa Bay | 2.0 | 2.0 | CR |
| LAW | 295.5Z | EBCLC Clinic<br>**Fulfills Writing Requirement**<br>Rosa Bay | 5.0 | 5.0 | CR |
| LAW | 297 | Self-Tutorial Sem<br>David Oppenheimer | 1.0 | 1.0 | CR |

| | Units | Law Units |
|---|---|---|
| Term Totals | 15.0 | 15.0 |



Carol Rachwald, Registrar

# Berkeley Law
# University of California
# Office of the Registrar

Claire Elizabeth Molholm
Student ID: 3033525213
Admit Term: 2018 Fall



| | | | |
|---|---|---|---|
| Cumulative Totals | 59.0 | 59.0 | |
| Cumulative Totals | 86.0 | 86.0 | |

* Due to COVID-19, law school classes were graded credit/no pass in spring 2020.

2020 Fall

| Course | | Description | Units | Law Units | Grade |
|---|---|---|---|---|---|
| LAW | 222 | Federal Courts<br>Erwin Chemerinsky | 4.0 | 4.0 | H |
| LAW | 225 | Legislation & Statutory Interp<br>Jonathan Gould | 3.0 | 3.0 | H |
| LAW | 288.1 | Immigration Law<br>Letitia Volpp | 4.0 | 4.0 | H |
| LAW | 295.6A | Civil Field Placement<br>**Units Count Toward Experiential Requirement**<br>Susan Schechter | 4.0 | 4.0 | CR |
| LAW | 295B | Field Placement Workshop<br>**Units Count Toward Experiential Requirement**<br>Shih Wu<br>Susan Schechter | 1.0 | 1.0 | CR |

| | Units | Law Units |
|---|---|---|
| Term Totals | 16.0 | 16.0 |
| Cumulative Totals | 75.0 | 75.0 |

2021 Spring

| Course | | Description | Units | Law Units | Grade |
|---|---|---|---|---|---|
| LAW | 207 | Rep Spanish-Speaking Clients<br>**Units Count Toward Experiential Requirement**<br>Fernando Flores | 1.0 | 1.0 | CR |
| LAW | 207.5 | Advanced Legal Writing<br>**Fulfills Either Writing Requirement/Experiential**<br>Lindsay Saffouri | 3.0 | 3.0 | HH |
| LAW | 231.1 | Crim Procedure- Adjudication<br>Andrea Roth | 4.0 | 4.0 | H |
| LAW | 245.2 | Civil Trial Practice<br>**Units Count Toward Experiential Requirement**<br>Ioana Petrou<br>Charles Smiley | 3.0 | 3.0 | H |

| | Units | Law Units |
|---|---|---|
| Term Totals | 11.0 | 11.0 |

Carol Rachwald, Registrar

**University of California**
**Berkeley Law**
**270 Simon Hall**
**Berkeley, CA 94720-7220**
**510-642-2278**

## KEY TO GRADES

1. Grades for Academic Years 1970 to present:

| | | | | | |
|---|---|---|---|---|---|
| HH | – | High Honors | CR | – | Credit |
| H | – | Honors | NP | – | Not Pass |
| P | – | Pass | I | – | Incomplete |
| PC | – | Pass Conditional or Substandard Pass (1997-98 to present) | IP | – | In Progress |
| NC | – | No Credit | NR | – | No Record |

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: https://www.law.berkeley.edu/careers/for-employers/grading-policy/

Transcript questions should be referred to the Registrar.

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# Oberlin College

# Transcript of Academic Achievement



Name:
Claire E Molholm

College:
College of Arts & Sciences

Date of Issue:
March 21 2022

Degree(s) Earned:
Bachelor of Arts

Graduation Date:
December 21 2013

Major(s):
Politics

Concentration(s):

Minor(s):

Honors:

Winter Terms: 3.0 Completed

Comments:

| AP | Transfer | Graded | Total | GPA |
|---|---|---|---|---|
| 00.0 | 46.0 | 057.0 | 117.50 | 3.58 |

See explanation of grading system on reverse side.

| Dept No | Title | Grade | Credits |
|---|---|---|---|
| | **Fall Semester 2008** | | |
| Transfer from Bard College | | | |
| BIOL 000 | General Biology I | X | 4.0 |
| EAST 000 | Beginning Chinese III | X | 3.0 |
| MATH 000 | Calculus I | X | 4.0 |
| | **Spring Semester 2009** | | |
| Transfer from Bard College | | | |
| BIOL 000 | General Biology II | X | 4.0 |
| EAST 000 | Chinese 201 | X | 3.0 |
| HIST 000 | Modern China | X | 3.0 |
| MATH 000 | Calculus II | X | 4.0 |
| | **Fall Semester 2009** | | |
| Transfer from Bard College | | | |
| SOCI 000 | Equality | X | 3.0 |
| | **Spring Semester 2010** | | |
| Transfer from Bard College | | | |
| CINE 000 | Documentary Film Making | X | 1.0 |
| DANC 000 | Capoeira | X | 1.0 |
| | **Fall Semester 2010** | | |
| Admitted to the College of Arts and Science | | | |
| ECON 101 | Principles of Economics | A- | 3.0 |
| FYSP 146 | HIV/AIDS in America | A- | 4.0 |
| HISP 101 | Elementary Spanish I | A- | 5.0 |
| POLT 117 | Intro to Comp Politics of MENA | A- | 3.0 |
| POLT 199 | Oil and the Middle East | P | 1.0 |
| | **Winter Term 2011** | | |
| HISP WT003 | Guadalajara Program | | Full |
| | **Spring Semester 2011** | | |
| CAST 995 | Rdg: HIV Lesson Plan | P | 1.0 |
| HISP 202 | Intermediate Spanish I | B+ | 4.0 |
| POLT 219 | Work, Workers & Trade Unions | B+ | 3.0 |
| POLT 995 | Rdg: Immigration,ESL & Com Org | P | 2.0 |
| RELG 226 | MRT: Mid-19th Cent-Present | B+ | 3.0 |
| | **Fall Semester 2011** | | |
| ECON 251 | Intermediate Macroeconomics | P | 3.0 |
| EXCO 218 | Asian Cuisine | P | 1.0 |
| HISP 203 | Intermediate Spanish II | A- | 4.0 |
| HIST 201 | Brutal Borders: US & Mexico | A- | 3.0 |
| LATS 201 | Ciudad Juarez | P | 1.0 |
| POLT 214 | Soc & Pol Chg in E Europe | B | 3.0 |
| | **Winter Term 2012** | | |

Trecia Pottinger

Trecia Pottinger, Associate Dean / Registrar

# Oberlin College Transcript of Academic Achievement

HIST WT003 Solidarity Work in El Salvador Full




Trecia Pottinger

Trecia Pottinger, Associate Dean / Registrar

# Oberlin College Transcript of Academic Achievement



Name:
Claire E Molholm

Date of Issue:
March 21 2022

(Transcript Cont.)

| Dept No | Title | Grade | Credits |
|---|---|---|---|
| | Spring Semester 2012 | | |
| CAST 311 | Militarization Am Daily Life | A | 4.0 |
| CAST 995 | Rdg: Teaching HIV Curriculum | P | 1.0 |
| CINE 299 | Persistence of Vision | A- | 4.0 |
| EXCO 714 | Fermentation & Food Activism | P | 1.0 |
| JWST 190 | Gender Sexuality Jewish Thght | P | 1.0 |
| POLT 232 | Eur Polt Theo: Hobbes to Marx | B+ | 3.0 |
| | Fall Semester 2012 | | |
| CAST 995 | Rdg: ESL Work Group | P | 2.0 |
| ENGL 381 | (Mixed-)Media Studies | A- | 4.0 |
| POLT 202 | American Constitutional Law | A- | 4.0 |
| POLT 330 | Seminar: Political Disasters | A- | 3.0 |
| | Winter Term 2013 | | |
| | Academic Leave January 28, 2013 | | |
| CAST WT004 | Borderlands Literature | | Full |
| | Spring Semester 2013 | | |
| Transfer from Earlham College | | | |
| CAST 000 | Field Study in the Borderlands | X | 4.0 |
| POLT 000 | Critical Issues/Borderlands | X | 4.0 |
| POLT 001 | Identity,Privilege and Soc Chg | X | 4.0 |
| POLT 002 | Inequality Migration Borders | X | 4.0 |
| | Fall Semester 2013 | | |
| ATHL 149 | Mat Pilates | P | 0.5 |

Trecia Pottinger

Trecia Pottinger, Associate Dean / Registrar

OBERLIN COLLEGE
Oberlin, Ohio 44074-1044
440-775-8450



## *EXPLANATION OF GRADING SYSTEM*

***For students who matriculated at Oberlin College prior to Fall Semester 2004-2005***

**Letter Grades.** The grades recorded and their equivalents in quality points (used in computing grade-point averages) are as follows:

| A+ | A | A- | B+ | B | B- | C+ | C | C- | W | NE |
|---|---|---|---|---|---|---|---|---|---|---|
| 4.33 | 4.00 | 3.67 | 3.33 | 3.00 | 2.67 | 2.33 | 2.00 | 1.67 | 0.0 | 0.0 |

**Credit:** All passing work (A+ to C-) is given the uniform grade of **CR** (Credit).

Only courses assigned the grade of (or the equivalent of) C- or higher are entered on the transcript of academic achievement and included in the GPA. The policy of Oberlin College to report only positive achievement (courses graded C- or higher) was adopted to encourage students to explore unfamiliar areas of the curriculum.

***For students who matriculated at Oberlin College Fall Semester 2004-2005 and later***

**Letter Grades.** The grades recorded and their equivalents in quality points (used in computing grade-point averages) are as follows:

| A+ | A | A- | B+ | B | B- | C+ | C | C- | D | F | W |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 4.33 | 4.00 | 3.67 | 3.33 | 3.00 | 2.67 | 2.33 | 2.00 | 1.67 | 1.0 | 0.0 | 0.0 |

**Pass/No Pass.** All passing work (A+ to C-) is given the uniform grade of Pass (P). Work below C- is considered not passing, and is given a grade of No Pass (NP).

NP Grades appear on the transcript of academic achievement but are not calculated into the GPA.

**COVID-19 Provisions:** Grading options were changed temporarily as a result of COVID-19. Pass/No Pass was changed to Pass/No Entry (P/NE). The grade of P is the equivalent of C minus or higher. A grade of NE is the equivalent of a D or F. Courses where an NE grade was awarded do not appear on the official transcript; however, the NE grade is permanently kept in our records for reference. In Spring 2020, students who took a course under letter grade mode were able to change their grade mode to P/NE (where possible given course and division policies) after learning what their grade was in a course.

**AUDIT:** A course which is officially audited will appear on the transcript of academic achievement with a grade of **L or AU.**

**DEFERRED GRADE:** A course which spans more than one semester will be assigned a grade at the close of two semesters. In the interim, a grade of * denotes an un-graded completion of the first part of the course.

**CREDIT TRANSFERRED FROM ANOTHER INSTITUTION:** The grade of **X** will appear in the grade column. Credit hours are counted in total transfer hours but no grades are counted in the Oberlin College GPA.

**UNIT OF CREDIT:** The unit of credit is one semester credit. Beginning in Fall Semester 2013, courses in the College of Arts and Sciences are offered as full or half academic courses. A full academic course is equivalent to four credits; a half academic course is equivalent to two credits. Courses in the Conservatory of Music are offered for two, four, six or eight credits except for a small number of 1 credit courses.

**FULL TIME:** Beginning Fall 2013, a student enrolled in the Bachelor of Arts degree program must be registered for no fewer than three and one-half courses/14 credits to qualify for official full-time standing. Students in the Conservatory and the double-degree program must be registered for a minimum of 16 credits per semester to qualify for full-time standing.

**GRADUATION REQUIREMENTS:** Prior to Fall 2013, students in the College of Arts and Sciences were required to complete 112 semester hours, students in the Conservatory of Music 124 semester hours, and Double-Degree Students 152 semester hours. Beginning in the Fall Semester 2013, students in the College of Arts and Sciences must successfully complete a minimum of 32 full courses or the equivalent; students in the Conservatory of Music must complete 168 semester credits; and Double-Degree Students must complete 214 semester credits. All students, with the exception of transfer students, are also required to complete three Winter Terms. Neither credits nor letter grades are given for Winter Term participation. For detailed information on Oberlin College degree requirements, please see the Oberlin Course Catalog at catalog.oberlin.edu.

**CALENDAR:** The calendar is comprised of two fourteen week semesters and a reading period and final exam period of eight days, plus a winter term during January.

**SUSPENSIONS:** Effective Spring Semester 2020, non-academic suspensions are not reflected on the transcript unless a student fails to comply with the sanction against them. Questions regarding a student's standing for any given semester should be referred to the Dean of Students Office at 440-775-8462 or deanstu@oberlin.edu.

March 14, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I highly recommend Claire Molholm for a judicial clerkship. Claire is a talented legal writer and oral advocate who would be a tremendous asset in a judge's chambers.

Claire was a student in my Legal Research & Writing class (Fall 2018) and my Written & Oral Advocacy class (Spring 2019). Legal Research & Writing and Written & Oral Advocacy are required courses in the first-year curriculum that provide instruction in objective and persuasive legal writing, legal research, and oral argument.

With her excellent writing skills and natural ability to analyze the law, Claire stood out from the time I read her first assignment in Legal Research & Writing, a three-page memo predicting the outcome of a fact pattern concerning the unauthorized practice of law. Claire proceeded to improve her skills with the following assignments, culminating in a 12-page memo on a complex civil rights issue.

During our second semester together, when we shifted from objective writing to advocacy, I had the privilege of seeing Claire's talents truly emerge. She wrote a fantastic brief – clear, concise, thorough, and very persuasive – on a challenging Freedom of Information Act issue. For her efforts, I gave Claire the "Best Brief" award for our section, a significant accomplishment given the strength of the writers in the class.

In addition to being a wonderful writer, Claire is a superb oral advocate. After she submitted the brief described above, Claire, like all the other students in the class, argued the issues against another student before a practicing attorney who served as the judge. Claire impressed both the judge and me with her confident, yet respectful performance, held in a Ninth Circuit courtroom. She was perfectly prepared and articulate, and she gave strong answers to the judge's questions.

But Claire is not only a strong academic candidate; she is a kind and cooperative person. With her positive attitude, she worked well with her fellow classmates and with me. She was a real pleasure to have in class.

Precisely because of her helpful personality and strength as a legal analyst, I hired Claire to be one of my teaching assistants for the Spring 2020 semester of Written & Oral Advocacy. She proved to be a top-notch TA. Claire participated in class discussions where pertinent, offering the helpful perspective of someone who was in the students' shoes the previous year, and she provided helpful feedback on a short memo assignment. In addition, Claire helped the students prepare for oral argument and served as a judge. The students responded to Claire's intellect and amiable personality, frequently seeking her guidance on issues related to class or law school in general. Claire was always happy to help however she could.

Claire and I have discussed her interest in clerking, and I've shared with her anecdotes of my own (wonderful) experience as a clerk. Claire looks forward to an opportunity to observe legal disputes from the perspective of a judge's chambers, and to hone her legal writing and analytical skills in preparation for a career advocating on behalf of immigration clients.

Because of her considerable abilities as a legal analyst and writer, in addition to her engaging personality, I am confident that Claire would be an excellent clerk. Please do not hesitate to contact me if I can be of further assistance regarding Claire's clerkship application.
Sincerely,

Michelle Jerusalem Cole
Professor of Legal Writing
Legal Research, Analysis, and Writing Program
University of California, Berkeley School of Law


**Amy Belsher**
Staff Attorney
125 Broad St., 19th Fl.
New York NY 10004
(212) 607-3342
abelsher@nyclu.org

March 14, 2022

Dear Judge,

I am delighted to provide a letter of recommendation in support of Claire Molholm's application for a judicial clerkship. While working under my direct supervision, Claire has demonstrated a diligent work ethic, creative problem solving, and impressive legal analysis. I have no doubt that she will succeed if offered the opportunity to work in your chambers.

I am a Senior Staff Attorney at the New York Civil Liberties Union ("NYCLU"). I am a practicing attorney, barred in California (300761) and New York State (5606769). I litigate cases focused on immigrants' rights issues and work with Claire on most of my cases.

Claire joined the NYCLU as a fellow in September of 2021. While Claire has worked with multiple attorneys in the office, she has spent the majority of her time working under my supervision. My colleagues and I were immediately impressed with Claire's work ethic and eagerness to learn. She is constantly volunteering for work and asking for what more she can do to help. She approaches all assignments, big and small, with the same dedication and tenaciousness. Claire is often asked to handle last minute assignments and to balance the needs of different projects. She is able to swiftly adapt and manage her schedule, working late or on weekends when necessary. Claire has demonstrated an ability unique in junior attorneys to manage her own work and projects with a great degree of independence. At the same time, she is careful to check in when she needs guidance and "manages up" effectively. Claire is a conscientious colleague and a collaborative team member.

Claire has excellent research and analytical skills. I have supervised her on multiple challenging research assignments concerning complex issues in constitutional and immigration law. Claire and I often talk through her research together and different ways to approach emergent issues in the law. She proposes creative arguments, is receptive to feedback, and has an advanced grasp on the law. Claire recently prepared a lengthy and helpful research memo detailing the various federal statutory, constitutional, and state law claims the NYCLU might bring in a challenge concerning detention by federal agents.

Claire is also a strong writer. I assigned Claire a large portion of a brief to write and was impressed with her lucid and succinct prose. She was able to incorporate my suggestions and has grown as a writer in the few months since she started. Her work has been directly incorporated into multiple Second Circuit and district court briefs.

Claire is also detail-oriented. She has been assigned large parts of multiple briefs to proofread, cite check and bluebook, often on tight deadlines, and has taken extreme care to ensure compliance

with all applicable rules. She is a fast learner and was quick to adopt our workplace writing conventions.

Claire is a pleasure to work with and will make an exceptional clerk. Our impact litigation work can be stressful and, at times, emotional. Claire is deeply committed to our clients and has handled each of her cases with passion and care. She is not only focused and hardworking, but is kind, funny, and easygoing.

As a former clerk in the Eastern District of New York, I can say with confidence that Claire will excel as a clerk, and that the legal field will benefit from her gaining this experience. She is an outstanding attorney and would greatly serve our court system during a clerkship. Claire recognizes the value of a clerkship and how this experience will help her advance as a public interest attorney. She takes this role very seriously and will appreciate the experience of judicial deliberation, intensive research and writing, and learning from other attorneys' work.

Thank you for your time and consideration. If you have any questions, please contact me at 212.607.3342 or via email at abelsher@nyclu.org.

Kind regards,

*/s/ Amy Belsher*
Amy Belsher

May 4, 2020

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Re: Claire Molholm

Dear Judge Vitaliano:

I am happy to recommend my research assistant Claire Molholm for a judicial clerkship. She is a good student, a successful and energetic leader and participant in a number of law school and community service groups; a senior articles editor of the Berkeley Journal of Labor and Employment Law; and a very promising public interest/immigration lawyer. And, she is a deeply thoughtful and caring person, whom I have been very glad to get to know.

In my fall 2018 Civil Procedure class, Claire's exam grades and advocacy exercise scores placed her in the top 10% of a very competitive class. When called on in class she was well prepared and insightful in our dialog. She often attended office hours, where it was clear she was hungry to understand how litigation could be a tool for justice. We had a number of interesting (and heartfelt) discussions about the work she had done prior to law school as an immigration law para-legal, in which I found her to be very thoughtful.

In my fall 2019 Comparative Equality and Anti-Discrimination Law seminar, Claire gave a wonderful research presentation on the equality rights of asylum seekers in the United States and Germany. As in Civil Procedure, she was a frequent and insightful participant in class discussion.

Given Claire's academic success, it would be reasonable to expect her to have been buried in the books. But outside of class she was an activist leader in two pro bono projects, the La Raza Worker's and Tenant's Rights Project and the California Asylum Advocacy Project, and an editor of the Berkeley Journal of Labor and Employment Law.

Last fall Claire began working as one of my research assistants, helping me prepare the third edition of my (co-authored) casebook, Comparative Equality and Anti-Discrimination Law. She did an excellent job editing the chapter on equality, secularism, and religious clothing/symbols. This semester, she has been working on the supplement, drafting notes about developments post 2019. She has completed four notes for the equality and secularism chapter, including two focused on European law and two on US law. Her writing is excellent, needing little editing. It's no fluke that she won the best brief prize in her course on Written and Oral Advocacy.

From our office hours discussions and now her work as my research assistant, I've gotten to know Claire well. She feels deeply about immigration rights, and has walked her talk. In four semesters and two summers she has worked in the immigration units of three public defenders' offices, and a Berkeley Law immigration law clinic, in addition to her two immigration-related pro bono projects. Many of our students arrive at Berkeley with the goal of working in public interest law, only to be seduced by the appeal of big law. There's no question in my mind but that Claire will avoid that path.

In sum, Claire Molholm is making her mark at Berkeley Law as a strong student, an activist leader, and a participant in important scholarly, community and service learning activities. I have every confidence that she will be an excellent public interest/immigration lawyer, and (more to the point) an excellent law clerk. She has my highest recommendation.

Please feel free to contact me regarding this recommendation. I can be reached by email at doppenheimer@law.berkeley.edu or by phone at 510/326-3865.

Sincerely,

David B. Oppenheimer
Clinical Professor of Law

**Claire Elizabeth Molholm**
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## WRITING SAMPLE: ADVANCED LEGAL WRITING

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### PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

This brief is based on a hypothetical fact pattern from an advanced legal writing class. The research, analysis, and writing are substantially my own, including revisions based on comments provided by my instructor. Where indicated, portions of this brief have been eliminated for purposes of brevity. I would be happy to provide the complete brief. I was awarded the Jurisprudence Award (First in Class) for my written work in this class.

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## I. INTRODUCTION

The Wilsons cannot mask their hostile English-only policy as a workplace management tool. This discriminatory rule, rooted in a history of oppression, silences and punishes Navajo employees for conduct beyond their control. The EEOC ("Plaintiff") has filed this Title VII action on behalf of Burger Depot's Navajo employees against the Wilsons ("Defendants"), the owners of Burger Depot, who established and harshly enforced an English-only rule. Echoing a long history of forced assimilation, the Wilsons have disparately impacted Navajo staff by prohibiting them from speaking their native tongue in violation of Title VII. Because bilingual speakers cannot fully control which language they use, Navajo workers are especially vulnerable to discipline under the policy, even for minor, inadvertent lapses. Instead of bettering the workplace, Burger Depot's policy has only heightened ethnic strife and lowered staff numbers without improving business.

This Court must deny Defendants' motion for summary judgment on Plaintiff's disparate impact claim as it fails on three separate grounds. First, contrary to Defendants' claims, Plaintiff can easily establish a prima facie case of disparate impact as there is ample evidence that the English-only rule has had a significantly adverse effect on Navajo staff by denying them a privilege of employment and fostering a hostile work environment. Second, there is a genuine dispute as to whether Defendants' alleged business needs override the disparate impact of the policy as the English-only rule has only amplified ethnic tensions, hurt customer service, and failed to improve supervision. Third, even if the Court deems Defendants' justifications necessary, a reasonable juror could still find that Plaintiff's proposals of using bilingual supervisors and banning offensive speech equally serve Defendants' needs. Thus, the Court should deny Defendants' motion for summary judgment.

## II. STATEMENT OF FACTS

I removed the full statement of facts from this brief due to its length. By way of summary, this hypothetical case concerns Defendants' ban on employees using Navajo while at work. While the Defendants don't speak Navajo, they have sought out Navajo-speaking employees to serve their customer base. Although all staff are fluent in English, many bilingual staff struggle with "code switching," in which they unconsciously switch from English to their original language. Defendants first posted signs banning Navajo in the restaurant, breakroom, and kitchen, and later created a written policy that required employees to use English at all times except when assisting non-English speaking customers. While Defendants told employees that the ban would not be enforced during breaks, this was not stated in the policy. Defendants informed employees that they would be reprimanded and potentially lose shift preferences if they ever violated the policy. Defendants claim they created the rule so they could monitor the staff's language after an incident in which inappropriate comments were shared between Navajo-speaking employees. However, this conflict was resolved after management spoke to the culprits. Following the implementation of Defendants' policy, staff left and reported feeling discriminated against, and one staff member was reprimanded for accidentally speaking in Navajo.

## III. ARGUMENT

### A. Summary Judgment Standard [*Omitted for purposes of brevity*]

### B. Defendants' motion for summary judgment should be denied as there is a genuine dispute of material fact of whether Defendants' English-only rule disparately impacts Burger Depot's Navajo employees.

Title VII of the Civil Right Act of 1964 was created to prevent precisely the type of invidious discrimination at issue here. 42 U.S.C. § 2000e-2(a)(1) (2012). Title VII's protections are so broad that the act even prohibits "seemingly neutral practice[s]" that disparately impact an employee's "terms, conditions, or privileges" by overly burdening a protected group. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1485-1486 (9th Cir. 1993).

In assessing disparate impact cases, courts engage in a three-step analysis. First, a plaintiff must show that a "seemingly neutral" practice has a "significantly adverse impact" on a protected class. *Id.* at 1486. Second, after the prima facie case, the burden shifts to the defendant to present a "sufficiently compelling" justification that "override[s] the discriminatory impact." *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 675 (9th Cir. 1980). If the defendant

cannot prove this, the practice violates Title VII. *Id*. Third, even if the defendant meets his burden, the plaintiff wins if he shows that an alternative policy would "serve" the defendant's needs "without discriminatory effects." *Blake v. City of Los Angeles*, 595 F.2d 1367, 1372 (9th Cir. 1979).

Here, the Court should deny Defendants' motion for summary judgment as there is a genuine dispute of material fact. First, Plaintiff can show a wealth of evidence that the English-only rule denies Navajo staff the privilege of conversing on the job and that it creates a hostile work environment. Second, there is a genuine dispute as to whether Defendants' alleged business needs are "sufficiently compelling." Third, even if Defendants meet their burden, summary judgment should be denied as a reasonable juror could find that Plaintiff's suggestions of banning offensive speech and using bilingual supervisors "serve" Defendants' needs.

**1. Plaintiff can establish a prima facie case as there is ample evidence that the English-only rule has a "significantly adverse effect" on Navajo employees.**

To establish a prima facie case of disparate impact, a plaintiff must identify a "specific, seemingly neutral" policy that has a "significantly adverse impact" on a protected class. *Spun Steak*, 998 F.2d at 1486. For an English-only rule, a plaintiff need only show that it either has 1) a significantly adverse effect on an employee's privilege of conversing or 2) that it creates a hostile work environment. *Id.* at 1487, 1488. Here, as there is substantial evidence under both theories, Plaintiff has met its prima facie burden.

**a. The English-only policy denies Navajo employees the privilege of speaking on the job since they are required to use bilingual language skills, subject to unclear rules, and punished for accidental lapses.**

A prohibition on an employee's ability to speak in his native language can deny him a "privilege" of conversing on the job. *Id.* at 1487. When defined broadly, the ability to converse is "a significant privilege of employment." *Id*. If employees (1) cannot "readily observe" an

English-only rule, (2) risk violating the rule beyond the "occasional" lapse, and (3) face penalties for "minor slips of the tongue," the policy most likely denies them a privilege of employment. *Id.* at 1487, 1488. Yet, an employee's ability to volitionally comply with such a rule is a "factual issue" meant for trial. *Id.* at 1488.

Contrary to Defendants' characterization, *Spun Steak* actually bolsters Plaintiff's claim that Navajo staff have been denied a privilege of employment. *See* Defs.' Br. 7. In *Spun Steak*, the Ninth Circuit only denied summary judgment for Hispanic employees because they failed to prove that the English-only rule was more than a "inconvenience." *Id.* at 1488. As staff were still free to speak Spanish "[d]uring lunch, break, and employees' own time," the court held that the privilege at stake was narrow. *Id.* at 1483, 1487. The court was also compelled by the fact that workers violated the policy "without incident." *Id.* at 1483. Because bilingual staff only risked "occasional" lapses due to the limited scope of the rule and were not penalized for "minor slips of the tongue," the court held that bilingual staff could "readily comply" with the policy. *Id.* at 1487, 1488.

Defendants also barely acknowledge cases that consider linguistic evidence previously unavailable. In *EEOC v. Premier Operator Servs., Inc*., the court held that English-only rules heavily burden even "fully bilingual" staff. 113 F. Supp. 2d 1066, 1075 (N.D. Tex. 2000). The court found that "code switching," in which bilingual persons "unconsciously" revert to their native tongue, made compliance not "a matter of preference." *Id.* at 1070. Because staff had to speak Spanish for the job, forcing them to switch between languages, the policy penalized those who accidentally kept "speak[ing] in the language" they just spoke. *Id.* The court was so moved by "code switching" that it found that *Spun Steak* might have been decided differently if the studies were available then. *Id.* at 1074. Because the rule banned all Spanish on the premises

when not assisting a client, the court found the policy unduly harsh. *Id.* Since staff risked termination for violations, the court held that the rule unfairly punished Hispanic workers. *Id.* at 1069-70.

Here, summary judgment must be denied because an employee's ability to volitionally comply with an English-only rule is a "factual issue" meant for trial. *See Spun Steak*, 998 F.2d at 1488.[1] Because bilingual workers struggle with "code switching," a reasonable juror could easily find that Defendants have denied Navajo staff a privilege of employment. *See Premier*, 113 F. Supp. 2d at 1074. As the court noted in *Premier*, *Spun Steak*'s reach is limited; in 1993, contemporary linguistic evidence was not available. *See id.* Yet, it is now well-established that bilingual speakers "unconsciously" revert back to their original language, making compliance not a "matter of preference." *See id.* at 1070; Aquino Decl. ¶ 7. The English-only rule is not just an "inconvenience," but a burden, as employees testify that what takes them once to say in Navajo "can take three or four times as long in English." *See Spun Steak*, 998 F.2d at 1488; Nez Decl. ¶ 6.

Defendants also fail to disclose that their staff are especially burdened because they must switch between languages. *See* Nez Decl. ¶ 8. Instead, they claim that English fluency is the only relevant factor here. *See* Defs.' Br. 8-9. Yet, they omit that, unlike in *Spun Steak*, the staff here were hired for their ability to speak Navajo. *See* 998 F.2d at 1483; Nez Decl. ¶ 8. As the court held in *Premier*, bilingual employees are vulnerable to violating English-only policies as they

[1] The other cases supporting Defendants' motion are also easily distinguishable, actually strengthening Plaintiff's argument. *See, e.g.*, *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1408 (9th Cir. 1987) (job did not require bilingual skills); *Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980) (employee was permitted to speak Spanish during his free time); *Kania v. Archdiocese of Philadelphia*, 14 F. Supp. 2d 730, 734-35 (E.D. Pa. 1998) (job did not necessitate bilingual skills); *Long v. First Union Corp. of Virginia*, 894 F. Supp. 933, 938-39 (E.D. Va. 1995) (customer base was not half Spanish speaking, requiring less switching between languages).

will generally "continue to speak in the language" they just spoke. *See* 113 F. Supp. 2d at 1070. As the majority of customers are Navajo, staff must constantly switch between languages, making their slips not "occasional" but frequent. *See Spun Steak*, 998 F.2d at 1488; Nez Decl. ¶ 3. Despite being fluent in English, workers still "accidentally slip into Navajo," showing that the demands of the job, not English fluency, hinder workers' compliance. *See* Pierce Dep. 1:15-17.

Finally, Defendants claim that their policy is not "strict[ly] enforce[d]," when in truth their rule is overly broad and punitive. *See* Defs.' Br. 9. First, unlike in *Spun Steak*, the ability to converse is not "narrow" here. *See* 998 F.2d at 1487. While Rob Wilson said that the rule would not apply to breaks, the written policy mandates English at all times. *See* Nez Decl. ¶ 5. This blanket policy coupled with the earlier prohibition in the breakroom creates confusion, pressuring staff to overly restrict their speech. *See* Wilson Dep. 10:18-23. As in *Premier*, where staff could not speak Spanish on the premises, here, staff cannot speak Navajo in practice, making them vulnerable to lapses. *See* 113 F. Supp. 2d at 1074. Second, their policy does in fact "penalize minor slips of the tongue." *See* Defs.' Br. 9. Unlike in *Spun Steak*, where staff broke the rules "without incident," here, staff face consequences for accidental lapses. *See* 998 F.2d at 1483; Nez Decl. ¶ 5. Akin to *Premier*, where workers faced job penalties, here, staff risk written reprimands and loss of shift preferences. *See* 113 F. Supp. 2d at 1069-70; Nez Decl. ¶ 5. Defendants also poorly justify their punishment of Mr. Redstone, claiming that his lapse was a "safety" risk. *See* Defs.' Br. 9. Yet, his harmless error only exemplified "code switching," demonstrating the severity of the policy. *See Premier*, 113 F. Supp. 2d at 1070; Nez Decl. ¶ 10. Thus, the English-only rule clearly denies staff a privilege of conversing on the job.

**b. There is substantial evidence that the English-only rule fosters a hostile work environment because, *contrary to Defendants' claims*, it is a "strictly enforced," "blanket policy" that has amplified ethnic tensions.**

The "totality of the circumstances," rather than a single factor, dictates whether English-only policies create an atmosphere of "isolation, inferiority or intimidation." *Spun Steak*, 998 F.2d at 1488-90. Whether a working environment is "infused with ethnic tensions," is a factual question for trial. *Id.* English-only policies that "exacerbate existing tensions," "contribute to an overall environment of discrimination," or that are enforced in a "draconian manner" most likely create hostile work environments. *Id.* at 1489.

Despite Defendants' assertions, *Spun Steak* presents starkly different facts than those at issue here. *See* Defs.' Br. 9-11. In *Spun Steak*, the Ninth Circuit found that that there was not a hostile work environment only because employees solely provided "conclusory statements" without any factual support. 998 F.2d at 1489. In response, the court considered the fact that the rule was meant to "promote racial harmony." *Id.* at 1483, 1489. Because Hispanic staff had used their "bilingual capabilities" to harass workers in "a language they could not understand," the court found the rule necessary in preventing staff from using Spanish to "isolate and intimidate" other ethnic groups. *Id*.

Defendants also distort the holdings in *Maldonado* and *Premier*, claiming that a hostile work environment requires that English-only rules be "combined with other egregious discriminatory behavior." *See* Defs.' Br. 10. In actuality, the Tenth Circuit in *Maldonado v. City of Altus*, held that an English-only "policy itself, and not just the effect of the policy" may create hostility. 433 F.3d 1294, 1304-05 (10th Cir. 2006). The court found the "very fact" that Hispanics were banned from using Spanish problematic. *Id.* at 1305. Because the policy was enforced beyond its terms for no "legitimate purpose," the court found a greater inference of

hostility. *Id.* As Hispanics faced greater restrictions than their peers, making them feel "second-class" and "fear and uncertainty" in their work, the court held that the policy likely created a hostile workplace. *Id.* at 1301, 1304.

Lastly, the court in *Premier* did not require other egregious conduct, but rather found that an English-only rule itself was "tantamount to intimidating" a protected class. 113 F. Supp. 2d at 1070. Because the policy applied at all times, except when assisting Spanish speakers, the court found that Hispanic staff were under constant threat of being reprimanded, creating a hostile environment of "oppressive monitoring." *Id.* at 1075.

Here, Defendants insist that their English-only rule is neither a "blanket policy" nor has it been "strictly enforced," when in truth the facts actually mirror rather than "stark[ly] contrast" those in *Premier* and *Maldonado*. *See* Defs.' Br. 11. Like in *Premier*, there is a blanket written policy here. *See* 113 F. Supp. 2d at 1074; Nez Decl. ¶ 5. While Defendants announced that the policy would not apply to breaks, the scope of the rule is still unclear. *See id.*; Wilson Dep. 10:18-23. Similar to *Maldonado*, where the policy was enforced beyond its terms, staff have reason to follow the wider restrictions to avoid punishment here. *See* 433 F.3d at 1305. Without a "legitimate purpose" behind this blanket policy, there is also a greater inference of hostility here. *See id*.

While Defendants portray their English-only policy as lenient, their hostile policy is actually enforced in a "draconian manner." *See* Defs.' Br. 11. Because Navajo staff face reprimands and loss of shift preferences for even unconscious lapses, they face greater "fear and uncertainty in their employment" than their non-Navajo peers. *See Maldonado*, 433 F.3d at 1301; Nez Decl. ¶ 5. The broad scope of the policy and the bilingual demands of the job make Navajo staff especially vulnerable to lapses, threatening their job security as in *Premier*. *See* 113 F.

Supp. 2d at 1074. As Mr. Redstone was penalized by his non-Navajo supervisor for his instinctual response, the policy clearly creates an environment of "oppressive monitoring." *See id.* at 1075; Nez Decl. ¶ 10.

Contrary to Defendants' claims, their oppressive rule was not needed to build a "more respectful and harmonious workplace." *See* Defs.' Br. 11. Dissimilar to *Spun Steak*, in which Hispanic staff spoke in Spanish about their non-Hispanic coworkers, Navajo staff have not used their "bilingual capabilities" to conceal insults from their non-Navajo peers. *See* 998 F.2d at 1483, 1489; Wilson Decl. ¶¶ 8-10. As staff have not "isolate[d] and intimidate[d] members of other ethnic groups," there is no need to "promote racial harmony" here. *See id.* While Defendants claim that the rule curbed the use of the "Navajo language to disrespect other employees," the evidence shows that a discussion with the two culprits, rather than the policy, remedied the use of Navajo for offensive comments. *See* Defs.' Br. 11; Pierce Dep. 3:3-25.

Instead of mending ethnic divides, the rule has only "exacerbate[d] existing tensions." *See Spun Steak*, 998 F.2d at 1489. As in *Maldonado*, Defendants' "policy itself, and not just the effect of the policy" is abusive. *See* 433 F.3d at 1304-05. While there hasn't been ethnic taunting, the "very fact" that the policy forbids Navajo is hostile. *See id.* at 1305. The Charging Parties were terminated only because they refused to a sign a policy that "unfairly punish[ed]" them. *See* Nez Decl. ¶¶ 6-7. The policy has made staff feel "exploited," generating feelings of being "second-class." *See Maldonado*, 433 F.3d at 1301; Nez Decl. ¶ 8. The policy is also clearly directed at Navajo staff as the prior rule explicitly banned Navajo while management is still free to speak German. *See* Nez Decl. ¶¶ 4, 8. Defendants' targeted policy echoes a long history of oppression. *See* Aquino Decl. ¶¶ 4-6. As Navajo people were historically forbidden from and punished for speaking their language, this rule evokes a tradition of cultural genocide, infusing

the workplace with "ethnic tension." *See Spun Steak*, 998 F.2d at 1488. Thus, as Defendants' English-only rule clearly has a "significantly adverse impact" on Navajo staffs' employment privileges, Plaintiff has met its prima facie burden. *Id.* at 1486.

**2. Defendants' motion for summary judgment should be denied as their uncompelling business needs do not vindicate their hostile English-only rule.**

[*Omitted for purposes of brevity*]

**a. Workplace harmony does not qualify as a business necessity as the English-only rule has only undermined employee retention and recruitment and escalated ethnic tensions.**

[*Omitted for purposes of brevity*]

**b. Because the majority of customers are Navajo and not all staff wait on customers, customer service is not a "compelling" business need.**

[*Omitted for purposes of brevity*]

**c. Defendants' alleged need for adequate supervision does not trump the discriminatory impact of their English-only rule as they would still be incapable of monitoring all employee communication.**

[*Omitted for purposes of brevity*]

**3. Even if compelled by Defendants' business needs, the Court must deny Defendants' motion for summary judgment as Plaintiff has established "less-discriminatory" alternatives that are "equally valid."**

[*Omitted for purposes of brevity*]

**IV. CONCLUSION**

[*Omitted for purposes of brevity*]